

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

FREE SPEECH COALITION, INC.,)	09-cv-4607
et al,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
THE HONORABLE ERIC HOLDER, JR.,)	
in his Official Capacity as)	
Attorney General of the United)	
States,)	Philadelphia, PA
)	June 5, 2013
Defendant.)	9:10 a.m.

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE MICHAEL M. BAYLSON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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I N D E X

<u>WITNESS:</u>	<u>THE</u>				
<u>PLAINTIFF'S WITNESS:</u>	<u>COURT</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Tom Hymes	25		9 (Wye)	19 (Mur) 29 (Mur) 33 (Mur)	32 (Wye)
Mary L. Levine	65	35 (Mur)	50 (Bla)	75 (Mur)	81 (Bla)
David B. Levingston		83 (Mur)	100 (Bla)	124 (Mur)	
Adriana Vecchio		141 (Mur)			

<u>EXHIBITS MARKED:</u>		<u>IDENT.</u>	<u>EVID.</u>
85A through			
85C	Website images		58
307	Website images		59
65 through			
68	Nude photographs		99
90B	Photographs		116
89A	Model release		120

1 (The following was heard in open court at 9:10 a.m.)

2 THE COURT: Good morning, everyone. Okay. Please
3 be seated.

4 MR. MURRAY: Good morning, Your Honor.

5 THE COURT: Good morning. All right. Mr. Murray,
6 just tell us what we have in store for today and how long you
7 think it will be. I won't hold you to it, I just want to get
8 an idea.

9 MR. MURRAY: Yes, Your Honor. After the current
10 witness is finished, we will then call a plaintiff, Marie
11 Levine, and then we will call a plaintiff, David Levingston.
12 And those are the only witnesses that we have left until
13 Friday morning. I did call -- made some calls last night to
14 see if we could scrounge up the people who we put in the next
15 week and we couldn't. So we have two additional witnesses,
16 and then we have one last witness Friday morning, together
17 with Gail Dines, their expert Friday, is my understanding.
18 And that's what we --

19 THE COURT: Well, how long -- approximately how long
20 will the witnesses today take?

21 MR. MURRAY: I don't think -- I wouldn't be
22 surprised if we're done by noon, Your Honor. I'm not sure.
23 You know, and you said you wouldn't hold it to -- hold me to
24 it, but I don't see any reason why they're lengthy.

25 THE COURT: Well, are you all planning to stay in

1 Philadelphia tomorrow, or are you going back to Washing --

2 MR. MURRAY: Yes, I -- we are.

3 THE COURT: Are you going back to Washington, or you
4 don't know yet?

5 MS. WYER: We're staying.

6 MR. BLADUELL: We're staying.

7 THE COURT: All right. Do you have those cases
8 written down on the dep --

9 MS. WYER: Yes, Your Honor.

10 THE COURT: Now, do you still want to submit a
11 separate brief?

12 MS. WYER: I have that, also.

13 THE COURT: Okay. Good. You have one at least for
14 my law clerk?

15 MS. WYER: Yes.

16 THE COURT: Thank you.

17 All right. Because I'm going to look at this today,
18 and I may want to have some discussion about it. I have
19 another conference in another case at 12:30, so we're going to
20 have to break then if we don't -- if we haven't finished. But
21 since I -- since I had planned tomorrow to be here, if I'm not
22 in court, I -- I think I'm going to rule on the joinder
23 deposition issue and I'm -- and I probably want to read it.
24 Do we have a copy of that transcript? Or is it --

25 MR. MURRAY: We have it to offer, Your Honor. We

1 have it with us, yes.

2 THE COURT: All right.

3 MR. MURRAY: And --

4 THE COURT: Now, if I allow it, at least in part, do
5 you have objections to certain portions of it that -- for
6 hearsay or other reasons?

7 MS. WYER: Yes, Your Honor.

8 THE COURT: Have you communicated those objections
9 to Mr. Murray?

10 MS. WYER: The objections are in the transcript for
11 the most part.

12 THE COURT: Well, the general rule is that you only
13 make objections at a deposition of the form of the question.
14 Did you have agreement to make general objections as well?

15 MS. WYER: I don't think we made a specific
16 agreement, so I --

17 THE COURT: Well, if you --

18 MS. WYER: -- I do have other -- I do have --

19 THE COURT: I mean, as I understand the rule, and as
20 I practiced it when I was a lawyer, if a party wants to offer
21 a deposition at a trial, the opposing party has -- generally
22 has the right to impose -- to make substantive objections that
23 were not made at a deposition. Have you determined -- I mean,
24 I'll first tell you whether I'm going to allow it, but even if
25 I were to allow it in part, you'd still have the right to make

1 those objections. Do you know what -- which questions, if
2 any, you want to object to? Or you don't know yet?

3 MS. WYER: Yes, Your Honor, because there -- there
4 were really the same questions repeated over and over again.
5 So I -- I know the basis --

6 THE COURT: So all your objections would be in the
7 transcript?

8 MS. WYER: I think I may have additional objections,
9 but they -- they would be -- they would apply to a lot of the
10 transcript, but they would be the same objections over and
11 over again. But I can --

12 THE COURT: All right. Okay. For example, hearsay
13 -- hearsay is generally not objectionable at a deposition, but
14 it could be objectionable at a trial, unless it was admissible
15 under an exception to the hearsay rule. So that's just one
16 example of where there could still be an objection by the
17 Government, even if I were to allow part of the transcript.

18 All right. So I'm going to just try and come to a
19 agreement about this -- come to a ruling on this, so we --
20 let's see where we go, because I want to have some time to
21 read your memo and look at some of the cases. So we may want
22 to have some discussion about that this afternoon. Okay?

23 MR. MURRAY: And we have -- Your Honor, in -- in
24 reviewing it, we also will submit some alternative basis for
25 its admission, which I could recite right now, in case Your

1 Honor wants to --

2 THE COURT: You mean citations?

3 MR. MURRAY: Other portions of the rule and the
4 rules that would permit it. And cite --

5 THE COURT: Oh, all right. Well, if it's -- if
6 you're -- we can do that when we have an argument about it.
7 But let me -- I'll look at this first as soon as I can. And
8 it may be we'll take a longer lunch break, so I can have my
9 conference in the other case and consider this, and then
10 you'll come back and we can discuss it.

11 Okay. All right. Mr. Hymes, please. Because if I
12 allow the deposition, or any part of it, my intention would be
13 to read it tomorrow.

14 MR. MURRAY: That would be fine, Your Honor. And --

15 THE COURT: All right. Now, let me ask you one --
16 I'm sorry, we're still on discovery. Let me find out about
17 Friday. So have you decided who's going to go first?

18 MR. MURRAY: We -- we were going to put our last
19 plaintiff on Friday.

20 THE COURT: All right. What's that name?

21 MR. MURRAY: Barbara Nitke.

22 THE COURT: N-I --

23 MR. MURRAY: N-I-T-K-E.

24 THE COURT: And about approximately how long would
25 she take?

1 MR. MURRAY: Again, not -- you know, 45 minute
2 direct, Your Honor. I --

3 THE COURT: All right.

4 MR. MURRAY: I don't expect it to be lengthy.

5 THE COURT: All right. Okay. All right. And then
6 -- well, who are your two witnesses for Friday, the
7 Government?

8 MS. WYER: We have one witness for Friday, Gail
9 Dines.

10 THE COURT: D-I --

11 MS. WYER: -- N-E-S.

12 THE COURT: All right. You did a report on it?

13 MS. WYER: Right.

14 THE COURT: Right. All right. How long do you
15 estimate that testimony, direct?

16 MR. SCHWARTZ: Your Honor, the direct between an --
17 it could take an hour, maybe between an hour, hour-and-a-half.

18 THE COURT: All right. Okay. Those are the only
19 two witness -- I thought there was one more witness for
20 Friday, no?

21 MS. WYER: Well, we -- we have our paralegal.

22 THE COURT: Right. Well, she might testify
23 Thursday, tomorrow?

24 MS. WYER: Yes.

25 THE COURT: About the summary?

1 MS. WYER: Correct.

2 THE COURT: Yes. Well, let's do that. All right.
3 The only issue Friday -- and the reason I'm asking is I have
4 this -- it's -- I have -- I'm performing a wedding. I have
5 close friends, and this has been arranged long before this
6 trial, and I feel a commitment to show up. So, as I said
7 yesterday, that's approximately like 11:40 to 2:00. So we'll
8 just work around that. But it sounds like we'll be able to
9 get everybody in.

10 Okay. All right. Thank you.

11 All right. State your name for the record, please.

12 THE WITNESS: Tom Hymes.

13 THE COURT: All right. And you're still under oath.

14 THE WITNESS: Yes, sir.

15 THE COURT: Proceed.

16 CROSS-EXAMINATION

17 BY MS. WYER:

18 Q Good morning, Mr. Hymes.

19 A Good morning.

20 Q So yesterday you testified that -- we were looking at
21 your website and we were observing, essentially, that as of
22 May 13, 2013, there were a few postings that were put up in
23 2011. And otherwise, all of the postings were from 2009,
24 correct?

25 A That is incorrect. We -- that's what we discussed

1 yesterday, but there had been postings since then in 2013.

2 Q But as of May 13, 2013 --

3 A Correct.

4 Q -- that was correct?

5 A Correct.

6 Q And then since that time, as you kind of referenced
7 yesterday, there have been two additional posts, correct?

8 A I -- I think so, yeah.

9 Q And both of those were made -- one of those was made on
10 May 18th, correct?

11 A I don't recall.

12 Q And one was on June 1st, this last Saturday?

13 A I -- I believe so.

14 Q And both of those were made after you appeared at a
15 deposition in this case, correct?

16 A That is correct.

17 Q Now, you have testified that you are chilled in producing
18 -- producing depictions of sexual explicit conduct, correct?

19 A That is correct.

20 Q You are a writer, correct?

21 A That is correct.

22 Q So your -- what you -- what you would do on this website
23 is primarily write articles, correct?

24 A Primarily, but not only. Because I also take
25 photographs. In my current job, on occasion, I always take my

1 camera on assignment. And if there's no other photographers
2 around and there's something of interest, I'll shoot those.
3 They're sometimes published. And it would be my intent as
4 well to do the same thing on my -- on Daily Babylon.

5 So it's not only using other people's images, but I
6 would want to be able to use my own if they're relevant to the
7 story.

8 Q But what you are interested in doing is illustrating the
9 stories that you write, correct?

10 A Well, you know, primarily. But it could be the other way
11 around, where I take photographs and then the written word is
12 -- is a subsidiary to the photographs. That could happen
13 easily as well.

14 Q Your work until now has consisted of writing articles,
15 correct?

16 A That's my primary profession, yes.

17 Q And you have a -- you are primarily thinking that you
18 would post images that you get as promotional material from
19 people advertising what you would be writing about?

20 A That's -- that's one aspect of my 2257 concern that
21 marketing materials or banners that I might want to use, or
22 advertise that -- that type of stuff would include -- could
23 include images that trigger 2257. That's -- that is, of
24 course, a concern.

25 Q So 2257 does not have any impact on the content of what

1 you write, correct?

2 A On my written word? No. No. 2257, I don't believe,
3 refers to written content.

4 Q You have made this blog. Many other people have created
5 blogs and write things on the internet, correct?

6 A Correct.

7 Q And you consider yourself a journalist, correct?

8 A Yes.

9 Q You did not go to any school to study journalism,
10 correct?

11 A I did not.

12 Q You do not have a license to practice journalism,
13 correct?

14 MR. MURRAY: Objection, Your Honor. It assumes that
15 there is a license one can get to practice journalism.

16 THE COURT: Yes. You don't need a license to be a
17 journal -- I'll take judicial notice of that. We have freedom
18 of writing for journalists, for sure.

19 BY MS. WYER:

20 Q And you do not consider everyone who -- who has a blog or
21 posts articles on the internet to be a journalist, correct?

22 A I do not.

23 Q And in order to determine whether someone is a
24 journalist, in your mind, you would have to go and look at
25 that particular article and see if it meets certain whatever

1 undefinable criteria that you have, correct?

2 A Yes. It might be more than one article that one would
3 use to assess whether an individual is a full fledged serious
4 journalist.

5 Q So there are no objective general criteria that you can
6 define that would identify -- that would distinguish what you
7 do from another poster on the internet?

8 A Well, this is obviously a point of contention for
9 individuals and lately for the courts as well to determine
10 who's a journalist, who is not a journalist, what is
11 journalism. It's kind of up in the air.

12 Q Now, the potential depictions that you think you might
13 someday post on your blog if you were ever to go back to
14 working on your blog in -- with any frequency, you don't know
15 right now what articles those depictions would be
16 illustrating, correct?

17 A I do not.

18 Q So you don't -- you can't really predict what types of
19 depictions you may want to post with those articles?

20 A I'm not sure that that's entirely correct. I couldn't
21 say specifically. I couldn't point to a particular
22 photograph. I don't know what events I'm going to go to. But
23 I could tell you with some certainty that they would include
24 events say at clubs or at trade shows, which could very well
25 -- would likely include the type of content that would trigger

1 2257.

2 So there is a very high likelihood that among the
3 myriad types of content that I would want to and intend to
4 post to Daily Babylon would include 2257 triggering content if
5 I were to -- to do that. That -- that would be what I would
6 want to do.

7 Q In terms of the specific images that you might want to
8 use, you don't know the identities of any performers who might
9 appear in those images, correct?

10 A I could not tell you that at this point in time, of
11 course.

12 Q And you don't know the ages of those individuals,
13 correct?

14 A Of individuals I don't know? No.

15 Q You do not have a problem with primary producers checking
16 IDs of performers before creating an image of them engaged in
17 sexually explicit conduct, correct?

18 A To the contrary.

19 MR. MURRAY: Object -- objection, Your Honor.

20 THE COURT: What? You object?

21 MR. MURRAY: Yes. Whether he has a problem with
22 that or not is irrelevant to the --

23 THE COURT: Well, it's -- no, overruled. I think
24 it's appropriate cross-examination. You may answer. I had
25 asked similar questions to other witnesses. Go ahead.

1 THE WITNESS: I -- I don't have a -- a problem with
2 that.

3 THE COURT: All right. You do not have a problem?

4 THE WITNESS: I absolutely do not. To the contrary,
5 I believe that they should keep those records.

6 THE COURT: That they should what?

7 THE WITNESS: To check the identity of performers
8 and keep those records.

9 THE COURT: And keep the records?

10 THE WITNESS: Absolutely.

11 BY MS. WYER:

12 Q And you --

13 THE COURT: And by -- you mean identity, including
14 the age? Having some documentary proof of their age?

15 THE WITNESS: Primary producers, yes.

16 BY MS. WYER:

17 Q And if you were to take your own photograph and post it
18 on the website, you would be a primary producer, correct?

19 A If I were to do that, yes, I would be. If I'm taking my
20 own photograph, and it includes 2257 triggering content, I'm a
21 primary producer.

22 Q And in terms of secondary producers, there can -- you --
23 you are aware from your experience in the adult entertainment
24 industry that there can be several intermediaries between a
25 primary producer and the ultimate location where an image

1 appears, correct?

2 A I'm not sure I understand. You mean --

3 THE COURT: Well, if you don't -- wait, wait, if you
4 don't understand the question --

5 THE WITNESS: I don't understand the question.

6 THE COURT: All right. Rephrase the question.

7 BY MS. WYER:

8 Q You are aware that a primary producer can convey an image
9 to one secondary producer, correct?

10 A Yes.

11 Q And then that producer can convey the image someone else,
12 correct?

13 A Yes.

14 Q And so ultimately there could be a number of steps from
15 the primary producer to where an image ultimately shows up,
16 correct?

17 A Theoretically, yes. And -- yes. Yes.

18 Q And you are aware that because of that, it can be
19 difficult to trace the origin of a final image back to where
20 it was created, correct, if there were indication that --
21 where records were?

22 MR. MURRAY: Objection.

23 THE COURT: Yes. I don't -- can you rephrase that?
24 I don't -- I'm not sure I gather that -- I don't know if the
25 witness -- did you understand the question?

1 THE WITNESS: I'm -- I need it to be rephrased, I'm
2 sorry.

3 BY MS. WYER:

4 Q You are aware that a -- in order for a secondary producer
5 to -- in order for someone looking at a website -- well, let
6 me start by saying -- you don't have a -- it's not burdensome
7 for you to post a 2257 statement on your website, correct?

8 A I have to shift my -- okay. That's a different question.
9 Is -- it is burdensome. I've already testified to that, I
10 believe.

11 Q But the mere putting up the statement on the website is
12 not burdensome?

13 A You mean affixing onto a website a link to -- the
14 affixing of a link is not in and of itself terribly
15 burdensome.

16 THE COURT: Well, you say a link. I think what the
17 question asks you about is just putting a 2257 notice, say, on
18 the -- on the home page of your website?

19 THE WITNESS: Oh, I'm sorry, Your Honor.

20 THE COURT: Is that what you -- is that your
21 question?

22 MS. WYER: Yes.

23 BY MS. WYER:

24 Q Well, but it is a link because in most cases websites
25 have one link on their site that goes -- goes to the 2257

1 statement. So wherever you are in the site, you can click on
2 this link and it takes you to --

3 THE COURT: So it's a notice with a link?

4 THE WITNESS: Yeah, it's a link to a notice.

5 THE COURT: A link to a notice?

6 THE WITNESS: Yeah. So, I mean -- so the notice
7 itself presents certain problems for me. Putting the actual
8 link on the site is not problematic. That's just a -- a
9 technical function.

10 THE COURT: But you -- when you say you have a
11 problem, it's not a logistical problem? It's not a computer
12 problem?

13 THE WITNESS: No, it's not a logistical problem, no.

14 THE COURT: It's something you object to --

15 THE WITNESS: Right.

16 THE COURT: -- generally?

17 THE WITNESS: Yes, sir.

18 THE COURT: Okay.

19 BY MS. WYER:

20 Q And you are aware that the regulations provide a third-
21 party custodian option, correct?

22 A Yes, I am.

23 Q And you are aware that if someone goes to your website,
24 if there is a sexually explicit depiction and there is no link
25 to the location of records, it would be difficult to find the

1 source of the records, correct?

2 MR. MURRAY: Objection, Your Honor.

3 THE COURT: Overruled. Do you understand the
4 question?

5 THE WITNESS: If there -- if I went to a website and
6 there's image -- yeah, I'm -- and there was no link, there was
7 no 2257, that it -- that that doesn't automatically conclude
8 that you couldn't find where the images were from, but you
9 wouldn't be able to find it from a statement that no longer
10 exists on that site.

11 BY MS. WYER:

12 Q And you would agree with me that you cannot determine
13 someone's age by looking at a photograph, correct?

14 A Their exact age, correct.

15 MS. WYER: Nothing further.

16 THE COURT: All right. Redirect.

17 REDIRECT EXAMINATION

18 BY MR. MURRAY:

19 Q Mr. Hymes, would you explain then what the problem is
20 that you have with the notice that is not logistical?

21 A Well, the -- the notice is a part of the entire 2257
22 regulatory scheme. So it's not the -- the notice, per say,
23 that I have a problem with, but if I'm putting the statement
24 -- if I enter into the 2257 universe, then everything that is
25 a part of those regulations I am legally required to abide by.

1 And I am a scrupulously law-abiding individual. So if I don't
2 feel that I can abide by a law, I'm not going to break it.
3 And that's the discrimination that I've made. So it's not
4 specifically the statement, but it's everything that comes
5 with 2257 that I don't believe I can put myself, my family at
6 risk by entering it, so I avoid it.

7 Q And what information would you have to put on the
8 statement in your case?

9 A I'd have to put my home address for -- in particular.
10 That's the most -- probably the most problematic. And I'm not
11 willing to enter into the third-party because I'm still a
12 criminal risk. And I -- I'm still a criminal risk.

13 Q You mean a third-party custodian?

14 A Oh, yes, sir.

15 Q Now, you mentioned that --

16 THE COURT: Wait, I don't -- why -- why does the
17 third-party situation create a criminal risk for you?

18 THE WITNESS: Well, if they make a mistake, I'm
19 still criminally liable. And to me, the -- the regulations
20 are there, but there's no -- I don't -- you know, I don't know
21 that there are any real industry standards with -- or any set
22 standards with respect to third-party -- third parties who are
23 holding -- you know, who are taking care of -- of regulations.
24 I don't believe that that -- that industry has -- has
25 developed the standard.

1 So it's -- yeah, if -- if I'm still going to jail if
2 they make a record-keeping mistake, that's problematic.

3 BY MR. MURRAY:

4 Q Are you aware of the provision in the regulation that
5 specifically states that the use of a third-party custodian
6 does not relieve the producer of liability for any violations
7 of the statute?

8 A I am, sir.

9 Q Okay. And you're not willing to assume the risk of
10 mistakes made by the third-party custodian in that
11 circumstance?

12 A Correct.

13 Q Now, you were asked whether you've had a problem with --
14 well -- well, let me back -- you were asked if you had a
15 problem with the ID being checked by the primary producer, and
16 you indicated you don't have a problem with primary producers
17 checking IDs; is that correct?

18 A I do not.

19 Q As someone who's covered the adult industry for many
20 years, what is your understanding what the industry practice
21 has always been in that regard?

22 A In regard to checking that -- that primary producers
23 check IDs when they shoot. And -- and in this industry that
24 is universal, if not, you know, 100 percent. Not only for --
25 for age, but because they need to -- they're -- these are

1 commercial products then. If they're going to sell them,
2 there needs to be a chain of copyright custody, and they --
3 and they need to show those and prove those. And -- and it's
4 all a part of the record-keeping that comes with being a
5 primary producer. And a part of that, of course, is the age
6 of the performer.

7 Q And are you saying that apart from 2257, the industry has
8 always checked IDs, to your knowledge?

9 A To my -- to my knowledge, sir, yes.

10 Q Now, then you were asked once the -- once the image gets
11 from the primary producer down the stream of commerce, you
12 were asked a question about whether -- how anyone down the
13 stream of commerce would know where the 2257 records were
14 maintained. Do you recall being asked that?

15 A Yes.

16 Q To the extent that someone purchased from a secondary
17 producer, for example, a DVD created by a primary producer,
18 would the statement not be on the DVD that the customer got?

19 A Yes. Yes, sir.

20 Q And let me ask you this, Mr. Hymes. This 2257 applies to
21 the entire universe of sexual images as you understand it?

22 A Yes, sir. Pretty much, yeah.

23 Q And --

24 A 2257 and 2257(a).

25 Q Yes. And apart from a primary producer checking an ID

1 and verifying in each case that the people appearing in the
2 depiction are above the age of majority, can you think of
3 anything else that 2257 would accomplish? All the other
4 requirements of 2257 that any of the other requirements would
5 accomplish in preventing producers from using underage actors
6 and actresses?

7 MS. WYER: Objection. It calls for a speculation.

8 THE COURT: Overruled.

9 THE WITNESS: I'm sorry, I saw her stand up. Can --
10 can you just repeat it?

11 BY MR. MURRAY:

12 Q Yes.

13 A Okay.

14 Q You've acknowledged that you're fine with primary
15 producers checking IDs because they've always done it,
16 correct?

17 A Yes.

18 Q 2257 imposes a number of other requirements, however,
19 correct?

20 A Uh-huh.

21 Q Can you tell the Court, based on your experience, whether
22 those other additional burdens of 2257 do anything to prevent
23 the use of underage persons by primary producers?

24 A No, I don't believe they do.

25 Q And what kind of burdens do they add to someone like you,

1 who would be a secondary producer with respect to material
2 that came from the primary producer?

3 A All -- all of the requirements and -- and burdens of --
4 of the record-keeping and the added burden of being under a --
5 a potential criminal prosecution with potential jail term for
6 a first violation of five years for a record-keeping error.
7 Those are -- it's -- it's the imposition of the criminal
8 penalties for record-keeping for a scheme that, in my opinion,
9 does not meet its goals that I have a real problem with.

10 Q Now, you were asked whether or not you can tell the exact
11 age of someone just by looking at their picture?

12 A Yes.

13 Q Can you tell me whether or not in the vast majority of
14 cases, by looking at a photograph of a person depicted,
15 whether you can tell whether that person is over the age of
16 majority or not in the vast majority of cases?

17 A I believe in the vast majority that you -- you can tell
18 that -- yes, I think that you can. Yeah.

19 Q And for people who are over the age of 25, do you believe
20 that by looking at them or looking at their images, one can
21 tell whether or not they are over the age of majority?

22 A I believe, by and large, the answer to that is yes.

23 Q Okay.

24 MR. MURRAY: That's all I have. Thank you, Your
25 Honor.

1 THE COURT: All right. Re -- recross?

2 MS. WYER: No. No, Your Honor.

3 THE COURT: No questions?

4 MS. WYER: No questions, Your Honor.

5 THE COURT: All right. Just one second.

6 EXAMINATION

7 BY THE COURT:

8 Q Your understanding under the regulations for the 2257
9 notice that -- that you could have one notice with a link on
10 your home page and that would satisfy the statute of the
11 regulations? Or would you need a separate notice on every
12 depiction that was somewhere within your website, if you -- if
13 you know? I don't want you to guess.

14 A Well, my -- my understanding is that -- my understanding
15 is that the -- the notice is supposed to directly refer to the
16 images on their, so that when the investigator comes, they'll
17 know where to go to find the records that they need to find.
18 Can I elaborate on this for a second, Your Honor?

19 Q Sure. Yes.

20 A My under -- my observation -- and I do this a lot. This
21 is my job. I go and I -- I obviously don't check records
22 because I don't do inspections, but I check statements all the
23 time. And --

24 Q On -- on the internet?

25 A On the internet, on websites. In fact, this morning I

1 did that, went to some of the most trafficked web -- adult
2 websites on this planet. And in my opinion, including the
3 largest tube sites, none of them are, with their statements,
4 in compliant -- compliant. What they do is they have pages
5 that are simply lists of primary producers where they got the
6 content from. My understanding is -- is that they're supposed
7 to keep the records, either them or a third party. But that's
8 not what's --

9 Q You mean, the primary producers who are -- whose
10 detections are on the secondary --

11 A On it. But there's no way to know which images those
12 lists of producers relate to. It's just simply impossible.
13 And when you go from page to page and you click on the 2257 --
14 because, by law, they put the little 2257 link on every page
15 -- it goes to the same exact list of producers, no matter what
16 content is being displayed on that page.

17 Q Well, we've had a lot of depictions shown as exhibits in
18 this trial here.

19 A Uh-huh.

20 Q But not every depiction has a 2257 notice on it.

21 A No, because what they do is they just abrogate them in
22 one link at the bottom of the page. And for the life of me, I
23 don't see how that is -- if that will help the Government in
24 any way, shape, or form. Also, I don't think it is consistent
25 with the regulations. They're supposed to either keep the

1 records or have a third party.

2 Q Now, if you have a video -- say, a Youtube video for,
3 let's just say, a movie, you can't put the 2257 notice on
4 every --

5 A On every frame.

6 Q -- on every -- every frame?

7 A No, no, but that's not required for videos. For videos,
8 you're just supposed to put a statement 2257 -- and they all
9 do this -- at the beginning of the move. I think you can also
10 put it at the end.

11 Q Okay.

12 A And they're always there.

13 Q All right. They're -- okay.

14 A Yeah. Yeah.

15 Q So you're -- what you're talking about are still -- still
16 images?

17 A Yes, exactly. Yes.

18 Q But you think -- well --

19 A Well, no, sometimes -- sometimes they're videos, but
20 you'll go to the page and it will be any number of images,
21 ads, videos. There's no way to know, even from that video,
22 because I don't -- I think often the -- the little videos
23 won't have them on there. The -- the link will be on the
24 page.

25 Q Well, are you saying this is a confusing issue for people

1 in this industry, or --

2 A I cannot --

3 Q -- or it's -- or it's ignored -- or it's --

4 A I cannot speak to why they're doing that.

5 Q All right. Well, to you --

6 A I don't know.

7 Q I mean, you have a lot of experience here?

8 A Yeah.

9 Q Do you think the regulations are ambiguous? Or it's
10 confusing? Or people don't understand it? Or they don't
11 think it's being enforced, so they really don't care? Or it's
12 -- or --

13 A I -- I think --

14 Q Or none of the above? All of the above? Or something
15 else?

16 A I think it's a combination of those. And I think that
17 you're last one is -- is unfortunately the case. There
18 haven't been inspections now for how many years? Since 2006,
19 I believe. So it's eight, nine years. I mean, it's --
20 complacency -- complacency sets in. But, you know, 2257 is a
21 consistent topic. We write about it, we hold seminars at
22 every trade show. So it's not they're aware. And they --
23 they do them. I'm just -- I just think that it's extremely
24 problematic out there.

25 Q All right.

1 THE COURT: Do anybody have anymore questions as a
2 result of my questions?

3 MR. MURRAY: Yes, Your Honor.

4 THE COURT: Go ahead, Mr. Murray.

5 REDIRECT EXAMINATION

6 BY MR. MURRAY:

7 Q Mr. Hymes, you are familiar with the regulations? You've
8 read them?

9 A Yes, sir.

10 Q I want to direct your attention to section 75.8 of the
11 regulation. You're familiar with that one?

12 A I need to refresh myself, sir.

13 Q You've seen that --

14 A 75A, yes.

15 Q Okay. So according to the regulation, when it comes to
16 books, magazines, and periodicals, the statement has to appear
17 on the first page that appears after the front cover or on the
18 page in which copyright information appears, correct?

19 A Correct.

20 Q When it comes to a film or videotape which contains the
21 end credits, the statement referred to shall be presented at
22 the end of the end titles or final credits, and shall be
23 displayed for a sufficient duration to be capable of being
24 read by the average viewer, correct?

25 A Correct.

1 Q And any other film or videotape shall contain the
2 required statement within one minute from the start of the
3 film or videotape and before the opening scene, and shall
4 display the statement for a sufficient duration to be read by
5 the average viewer, correct?

6 A Correct.

7 Q And then when it comes to a computer site or service or
8 web address containing a digitally or computer-manipulated
9 image, visual image, or picture, shall contain a required
10 statement on every page of a website on which a visual
11 depiction of an actual human being engaged in actual or
12 simulated sexually explicit conduct appears, correct?

13 A Correct.

14 Q And such computer site or service or web address may
15 choose to display the required statement in a separate window
16 that opens upon the viewers clicking or mousing over the
17 hypertext link that states the statement, correct?

18 A That is correct.

19 Q But your understanding is that has to appear on every
20 page, correct?

21 A Yes. Yes.

22 Q Now, in the Youtube situation, if an American citizen
23 posts -- can post things on Youtube, correct?

24 A Yes.

25 Q Or on tube sites of other kind, correct?

1 A That's correct.

2 Q And a citizen from his home could actually post on -- on
3 a tube site a sexually explicit image of himself and/or his
4 partner; isn't that true?

5 A That is correct.

6 Q And under this regulation, when that citizen does that,
7 in order to comply with 2257, that citizen should put a -- a
8 label on the image that is being posted on the tube site;
9 isn't that true?

10 A According to these regulations, I believe, yes.

11 MS. WYER: Objection. That --

12 BY MR. MURRAY:

13 Q And that --

14 THE COURT: You object?

15 MS. WYER: Yes, Your Honor.

16 THE COURT: Overruled.

17 BY MR. MURRAY:

18 Q And that citizen from his home then would be required to
19 keep the records at his or her home, correct?

20 A Yes.

21 Q And is this on the 2257 statement that is being put out
22 there in the world, his or home address?

23 A Yes.

24 Q Now, when it -- then there's a section about digital
25 video disks containing multiple depictions being a single

1 Q And in what capacity?

2 A As a stripper.

3 Q Okay. And where was that?

4 A San Francisco.

5 Q How old are you now?

6 A I am 54.

7 Q Okay. And did you then begin appearing in adult films?

8 A I did in 1984.

9 Q And how old were you when you appeared in your very first
10 adult film?

11 A Twenty-five.

12 Q And do you recall who the first producer was of the film?

13 A Absolutely. Juliet Anderson.

14 Q And do you recall what the name of the film was?

15 A Educating Nina.

16 Q And who is Nina?

17 A Nina is my stage name.

18 Q And what is the full name of your stage name?

19 A Nina Hartley.

20 Q Okay.

21 A H-A-R-T-L-E-Y.

22 Q And at the time that you began in the adult film-making
23 industry in 1984, in your first production, did the producer
24 check your ID?

25 A Yes.

1 Q And was that standard practice?

2 A It was.

3 Q Okay. And they also had you sign model releases?

4 A They did.

5 Q Okay. And this was all before 2257 even came into being;
6 is that correct?

7 A It was, yes.

8 Q Okay. Now, during the 80s, when you were producing
9 -- working as a model in these sexually explicit films, did
10 any of the producers for whom you worked have any interest at
11 all in using minors?

12 A Absolutely not.

13 Q And what was the position of the part of the industry
14 that you were familiar with with respect to the use of minors?

15 A The general --

16 MR. BLADUELL: Objection, Your Honor. It assumes
17 facts not in evidence.

18 THE COURT: Well, it's hearsay, but it's not
19 admitted for the truth -- I'll -- I'll admit it not for the
20 truth of the matter asserted, but that's what she was told.
21 Overruled. Is -- that was the basis of your objection?

22 MR. BLADUELL: Yes, Your Honor. She could possibly
23 not have any knowledge of everything that's happening in the
24 industry, only that what she experienced.

25 THE COURT: Well, I think it's relevant as to what

1 she was told was going on. So I'll admit it for that purpose.

2 THE WITNESS: We would speak among -- about this
3 amongst ourselves, and the general consensus was that anybody
4 using minors should be covered in honey and tied to an ant
5 hill. Not fun.

6 BY MR. MURRAY:

7 Q So there was strong opposition to it?

8 A Very strong. Many of the people in the business are
9 parents, and they feel very strongly that the use of minors is
10 reprehensible.

11 Q Okay. Now, over the years can you tell the Court how
12 your career evolved?

13 A Yes. I started out as a dancer, and I made the sideways
14 move into movies; finished my college education and went into
15 adult entertainment full-time. And by the mid '90s I had
16 expanded my portfolio to also include educational films,
17 specifically, deliberately educational, not merely
18 entertainment.

19 And from there I started speaking at universities,
20 understudies classes, film classes, feminism classes. And I
21 also talked to doctors who were going to be therapists and
22 speak to them about sexual health and literacy and the
23 importance of that.

24 Q And did -- did your career result in you becoming one of
25 the more well-known actresses?

1 A It did. Partly because of my longevity and partly
2 because I've always been outspoken. I've always spoke
3 -- spoken to the press, to the public about my experiences as
4 a performer, both from a feminist perspective as well as a
5 civil liberties perspective.

6 Q And did -- and so did you engender a fan base, so to
7 speak?

8 A Yes, I have a very large fan base that goes around the
9 world.

10 Q Okay. Now, tell the -- the Court -- you started to talk
11 about your -- your sex education part. How important is the
12 educational component to your career to you?

13 A Well, the educational component is very important to me
14 personally because one of the dictates that nurses are called
15 upon to fulfill, of course, is what we call teaching education
16 and role modeling. And so I'm discovered, and our culture of
17 sexuality is sick, and sick people need a nurse's care. So
18 besides any fun that I may have had at my job, my primary
19 mission is to help lessen sexual fear and pain and isolation
20 in the world through education and movies.

21 Q And explain to the Court how you have accomplished your
22 goal of being a sex educator. What have you done?

23 A Well, I've spoken out publicly about sex and sexuality
24 since 1984. I was the first woman in adult entertainment to
25 seek out opportunities to speak to the public -- the greater

1 public about it because the political discourse of the mid
2 '80s was very volatile around the issue of adult entertainment
3 and could it be feminist and was it exploitative, and did it
4 demean the people who made the movies.

5 And there is -- they were talking about us a lot,
6 but no one was talking to us, the actual performers. And so I
7 took it upon myself to get out there and speak as a member of
8 the community that was being talked about but not spoken to.
9 And it is a continuing -- one of the best things about my job
10 is I get to help people figure out what's best for themselves
11 and their feelings.

12 Q And what -- what visual DVDs or other creations did you
13 make to help educate the public on issues of sexuality --
14 adult public?

15 A I have helped create -- I've co-produced and performed in
16 a 38-volume series of sex education DVDs from the company Adam
17 and Eve, collectively called The Nina Hartley Sex Guides. And
18 they are explicit and informational at the same time.

19 Q And what do they -- and when did you create these? Over
20 what period of years?

21 A Between 1995 and 2010.

22 Q And can you tell the Court what the general format of
23 each of these 38 DVDs?

24 A They're actually pretty -- all very straight up. Each
25 one starts with a -- a lecture about today's topic. And then

1 Q Okay. And tell the Court what you currently are doing.

2 A I currently continue to perform in videos, I lecture, I
3 have a website that I run, and I have toys that I sell, and I
4 sometimes write the occasional advice column for money. I had
5 a long-running Ask Nina blog that went on for over year that
6 was not explicit, at least words explicit, but not visually
7 explicit. And I just continue to go out there and talk,
8 again, about sex and sexuality and sexual expression for men
9 and women.

10 Q Now, I want to show you on the camera what has been
11 marked as Plaintiff's Exhibit 69 and ask if you can identify
12 that?

13 A That looks like a page from my website. Yes, it is.

14 Q Okay. And tell the Court what -- how your website works
15 and -- and what people can access.

16 THE COURT: Exhibit --

17 MR. MURRAY: I'm sorry, 69, Your Honor.

18 THE COURT: All right.

19 THE WITNESS: My website primarily has an archive of
20 the live weekly shows that I have done since 2002 or '3.
21 There is a store component where I sell -- where I sell toys
22 and movies that other people have produced. But the content I
23 personally produce is not for sale except as a membership to
24 my site.

25 BY MR. MURRAY:

1 A Yeah.

2 Q It's not uncommon to see teens performing in pornography,
3 correct?

4 A It's not uncommon to see women who have recently reached
5 the age of majority in adult films.

6 Q And if -- I'm going to show you Exhibits 85A to -- 85A,
7 please. These are also site from the -- these are also images
8 from the same site, correct?

9 A It does look that way, yes.

10 Q And 85B. Same -- same website?

11 A It does it appear to be similar.

12 MR. BLADUELL: Okay. I'll move them into evidence,
13 85A through 85C.

14 THE COURT: All right. Admitted.

15 BY MR. BLADUELL:

16 Q Ms. Levine, you also testified that whenever you've
17 performed in adult movies, they have checked your ID, correct?

18 A Correct.

19 Q And that you have seen producers checking the ID of other
20 people, correct?

21 A I have.

22 Q But there is sometimes that this exchange of IDs happens
23 and you're not there to see it, correct?

24 A Correct.

25 Q Sometimes you're outside the room where producers are

1 supposedly checking the IDs of the other performers, correct?

2 A Correct. But it doesn't really matter because they can't
3 produce a movie legally unless they collect an ID of everybody
4 in the movie, whether or not I witness personally.

5 THE COURT: So you rely on the primary producers to
6 do the checking?

7 THE WITNESS: Well, yes, they don't want to go jail.
8 And they want to have a -- they also want a part they can
9 legally sell.

10 BY MR. BLADUELL:

11 Q If we go to Exhibit 307, please. This is another -- this
12 is the same image from the site before where you were
13 performing with Alanah Rae in a website called Porn.com?

14 A Looks like me. Oh, there's my name.

15 Q And you didn't know that this video was posted in this
16 other site, correct?

17 A No. Once I -- once I make a movie, I have no control
18 over where it goes.

19 Q And it can be posted in many, many other sites?

20 A Once I sign the model release -- well, the movie was
21 never my property, but once I sign the model release, I have
22 absolutely no -- no performer has any say over what happens to
23 product after they have signed the release.

24 Q Okay.

25 MR. BLADUELL: Move into evidence 307.

1 BY MR. BLADUELL:

2 Q And let's go -- Exhibit 306, please. Ms. Levine, Exhibit
3 306 is a printout of a website called Bravo Tube, correct?

4 A Yes, it is.

5 Q And in the -- in the center of the picture you're
6 performing with other performers?

7 A I am.

8 Q And one of the performers is Tara Lynn Fox?

9 A Yes, it is.

10 Q And she's 19?

11 A She is.

12 Q And that's something that she told you, correct?

13 A Yes. And I never forget because she was the first
14 performer I worked with who was younger than my breast
15 implants.

16 Q Now, Ms. Levine, there are other images on this site,
17 correct?

18 A Yes.

19 Q And there's one at the left of a -- of a woman holding a
20 man's penis, correct?

21 A Yes.

22 Q And you cannot tell me that she's clearly over 18,
23 correct?

24 A Correct.

25 Q And there's another image on the right, from -- from the

1 top to the bottom, the third one.

2 A Yes.

3 Q You cannot tell me that that individual is clearly over
4 18, correct?

5 A Correct.

6 Q Now, let's go to -- admit into evidence 306. If we go to
7 Exhibit 87 now, please. This is another image of you
8 performing in a -- in a sexual explicit video?

9 A Yes.

10 Q And you're -- you're aware of what Redtube is correct?

11 A I know it's what they call a tube site. It's one of the
12 more popular ones.

13 Q And in a -- in a tube site you have a lot of videos that
14 are free pornography, correct?

15 A Stolen, but, yes. Free to the viewer, but not free to
16 us.

17 Q Okay. Now, before performing with this person, you
18 didn't -- you didn't know him, correct?

19 A No.

20 Q And --

21 A And I haven't seen him since.

22 Q You've never seen him since?

23 A No.

24 Q It's not uncommon in the pornography industry not to know
25 all of the performers, correct?

1 correct?

2 A They have. I have often been a mentor to women seeking
3 information about getting into adult film.

4 Q Some of them have been 19 years old, correct?

5 A Oh, yes.

6 Q One of them was Tara Lynn Fox, that one --

7 A She was already in the business actually. She did not
8 ask. I met her on the set that day, so she had been in the
9 business for -- not quite sure how long, but a few months.

10 Q So women also in the business that are 19 years old ask
11 your advice about going forward in the business, correct?

12 A They do. They see that I've lasted as long as I have,
13 and I am not dead or crazy or on drugs, and I seem to have an
14 okay life, and they'd like to know how to do that.

15 Q Now, you're considered a -- let's say a MILF in adult
16 industry language, correct?

17 A Yes, a MILF, a cougar, or now it's called mature.

18 Q And that's a term that is -- applies to women over 35
19 when you say that people consider attractive, correct?

20 A Yes. Although now, it's crazy, MILF has been lowered
21 down to 29-year-olds. Which is crazy because at 29 you cannot
22 have a -- you cannot have an age-majority child. But, yes,
23 pornography is weird that way.

24 Q Okay. But you would agree with me that most women enter
25 the adult industry in their 20s rather than when they're over

1 reasonable for --

2 A It is.

3 Q -- for primary producers, correct?

4 A Absolutely.

5 Q And you have never had a project that you've wanted to do
6 that you have decided not to do because of 2257, correct?

7 A Correct.

8 MR. BLADUELL: I have nothing further at this time,
9 Your Honor.

10 THE COURT: All right. Redirect.

11 Well, let me just ask a couple questions.

12 EXAMINATION

13 BY THE COURT:

14 Q The -- some of the images that were shown here while you
15 were testifying -- and we've had some of them in prior days --
16 used the word teens, T-E-E-N-S, correct?

17 A Correct.

18 Q All right. And would you say that that is a fairly
19 common term that is used advertising pornographically explicit
20 sexual scenes that -- with young performers?

21 A Well, certainly, for people whose preference is -- for
22 people whose preference is watching young women, teen would
23 certainly be a -- a attractive word.

24 Q Okay. All right. Now, we know that teens refers to
25 teenagers, correct?

1 it's a commercial product, so they're using advertising
2 language that's going to try to draw the audience that they're
3 looking for.

4 Q Does the use of the term "teens", based on your -- and
5 I'm asking all this on -- based on your experience, not -- and
6 if -- and I don't -- I'm not asking you to speculate. I don't
7 want you to speculate. But does the use of the word "teens"
8 in your mind attract -- let me -- let me rephrase the
9 question. Does the fact that there's a lot of advertising of
10 sexually explicit material using the word teens -- does that
11 create a market for young, youthful looking performers to get
12 jobs in the industry?

13 A There's always been a market for youthful looking
14 performers -- you know, performers in the industry. So using
15 the word "teen" isn't creating more of a market. There's
16 always been a market for young-looking adults. That's always
17 been a -- that -- that way that producers can stay this side
18 of the law and use people over the age of majority, and then
19 have the added financial benefit of having a youthful looking
20 person. So what people at home do with that image, you know,
21 I don't know. So --

22 Q Okay. Well, let me -- let me ask you this. And I -- I
23 don't mean to suggest that this is something that I'm -- I'm
24 just really asking. Have you ever seen any of these
25 advertisements saying teens (18-19) to make it clear --

1 Q You don't know. All right. Is that -- have you ever
2 concern -- heard about a concern about that?

3 A I've never heard, but I have a concern about it. That's
4 one of the problems of the internet is this -- there's no
5 barred entry. So an image goes on the internet and we don't
6 know where it's produced, we don't know under what
7 circumstances or conditions it was produced. And that has
8 always been a problem with me philosophically with the
9 internet because there is -- there is no way to know.

10 And one thing about my business -- the business
11 placed in Los Angeles is there is a blog entry. We have to
12 keep records, we have to pay them, we have to let them know
13 what they're doing. They have to sign a release. And so it
14 is a safer way to make adult movies. And the internet,
15 anybody can put up anything.

16 Q All right. Now, we've also had testimony this week that
17 -- and you said something similar -- that once a performer
18 performs in a video or a movie or a DVD, whatever, that the
19 performer really has no control over how that is used
20 subsequently, correct?

21 A Correct. And it says so in the model release. It says
22 that I, the model, have -- have no say.

23 Q All right. And -- and we had also testimony that one
24 scene -- one sexually explicit scene can be used in like 10,
25 20, or 50 different movies?

1 A Oh, yes.

2 Q And for videos?

3 A Oh, yes. I've had that happen to me.

4 Q Okay. And is it possible, in your experience, or has it
5 happened in your experience, that a scene which you have
6 knowledge has been spliced -- and we use that term about
7 getting these different separately shot scenes into one video
8 -- has been used with a -- another scene that was taken
9 outside the United States and had in it a performer who
10 arguably was under 18?

11 A It certainly could happen. It's not to my knowledge that
12 it's happened, but in what they call a compilation tape, which
13 is what you're describing --

14 Q Is that what they're called, compilation tapes?

15 A Compilation. So a scene from movie A, scene from movie
16 C, you know, and they put them together. So it's certainly
17 possible.

18 Q Okay. Now, do you know -- and I'm asking you these
19 questions because you have a lot of experience in this, but do
20 you know any way that can be prevented or precluded? Because
21 -- and my prelude to that question is that you're -- as I
22 understand your testimony, you're opposed to the industry --
23 this industry in the United States using children under the
24 age of 18 in sexually explicit, right?

25 A Oh, I am. Oh, yes, I am.

1 has a statement that all models are over 18?

2 A Yes.

3 Q That's been universal, hasn't it?

4 A Yes.

5 Q Okay. And has it been -- to your knowledge in the
6 market, regardless of how it's been received by the -- the
7 customers that -- that you're saying you don't have specific
8 knowledge of -- has it always been the purpose, as you
9 understand it, of that advertising to communicate the message
10 that you're talking about 18 and 19?

11 A Yes.

12 Q And that's been the intent of the commercial messages?

13 A Yes.

14 Q Now -- and, in your opinion, does 2257 do anything to
15 prevent the use of minors in the teen type genre --

16 A No.

17 Q -- that wasn't already being done by the producers?

18 A In my opinion, absolutely not.

19 Q Now, you were asked whether you can always tell if
20 someone is over the age of 18. And, obviously, the answer is
21 no, correct?

22 A Correct.

23 Q Would you tell the Court whether or not in the vast
24 majority of cases you can look at an image of someone and
25 determine whether that person is over the age of majority or

1 not?

2 A The vast majority? I don't know if I'd say vast
3 majority. More people in porn look over 18 than under 18.
4 But I couldn't give you a percentage.

5 Q Would you say that anyone over the age of 25 -- an image
6 of anybody at least 25 years old or older is not likely to be
7 confused with someone under 18?

8 A Likely not, unless she was of small stature.

9 Q Now, do you see anybody in this room who you would expect
10 is under the age of 18?

11 A No.

12 Q But do you know the precise ages of everybody in this
13 room?

14 A I do not.

15 Q Now, you were asked a lot of questions on cross-
16 examination about the money that you were making and the
17 profit sharing with your -- your partner and the images that
18 you produced, are you doing anything wrong, as far as you
19 know?

20 A As far as I know, I'm not.

21 Q Are you doing anything illegal?

22 A As far as I know, no.

23 Q Are you accustomed to being cross-examined about all your
24 images?

25 A No.

1 I do not say that it's not -- the really important message in
2 it is that no one dies.

3 In mainstream Hollywood, if you look at movies -- if
4 someone crosses a sexual line -- especially the woman crosses
5 the sexual line, something bad has to happen to her. And in
6 porn or adult entertainment nobody dies at the end, no one has
7 gone to jail, no is put to a mental institution, no one has
8 lost their job. And so it's important, I think, for people to
9 be able to view and read sexual speech so they know that
10 they're not alone, that they're not crazy, that they are not
11 somehow alone or crazy.

12 Sexuality is a really important part of people's
13 lives, and we suppress sexual speech and sexual knowledge at
14 our peril. I think our statistics on teen pregnancy and STDs
15 hold -- hold the truth to that, that ignorance does not help
16 anybody. And sexual ignorance is particularly harmful. Just
17 as credit ignorance puts people into ruin, sexual ignorance
18 can put people into ruin. And as a nurse and a health
19 professional, it's really important that we keep sexual speech
20 legal, even if it's distasteful or silly or ugly.

21 There's lots of adult material I find distasteful
22 and ugly and something that I wouldn't watch. And so as a
23 performer, I have to know that -- was it made legally? Did
24 they agree? Did they consent? Were they paid? Did they
25 understand what they were doing? Were they of age? Of

1 course, you have to consent -- you have to be of age to
2 consent, we understand that. And the -- the content is less
3 important for me than under -- the condition under which it
4 was made. Because loss of speech is horrific, we don't ban
5 the Bible, despite how much violence has come from that,
6 sexual or otherwise; we don't ban the Koran. You know, so
7 it's important that we keep sexual speech legal, even when it
8 makes us uncomfortable.

9 THE COURT: Okay. Thank you.

10 MR. MURRAY: That's all I have. Thank you, Your
11 Honor.

12 THE COURT: Recross?

13 RE CROSS-EXAMINATION

14 BY MR. BLADUELL:

15 Q Ms. Levine, you understand that 2257 does not prevent the
16 production of pornography, correct?

17 A Correct.

18 Q 2257 deals with checking IDs of performers; that's one
19 part, correct?

20 A Yes.

21 Q And keeping records?

22 THE COURT: Well, I think she understands that.
23 That's -- I don't think that's -- was the focus of the
24 redirect.

25 MR. BLADUELL: Nothing further.

1 THE COURT: You don't have anything else? All
2 right.

3 MR. BLADUELL: No.

4 THE COURT: All right. Thank you very much.

5 THE WITNESS: Thank you.

6 THE COURT: All right. You say you have one more --
7 one more witness this morning?

8 MR. MURRAY: Yes, Your Honor.

9 THE COURT: We'll take a 10 minute recess and then
10 we'll come back.

11 MR. MURRAY: Thank you.

12 (Recess taken, 10:52 a.m. to 11:09 a.m.)

13 THE COURT: Okay. You're ready for the next
14 witness?

15 MR. MURRAY: Yes, Your Honor. Plaintiffs call the
16 plaintiff David Levingston.

17 DAVID BERTRAM LEVINGSTON, PLAINTIFF, SWORN

18 THE CLERK: State your full name for the record and
19 spell your last name.

20 THE WITNESS: David Bertram Levingston, L-E-V-I-N-G-
21 S-T-O-N.

22 THE CLERK: Thank you very much. You may have a
23 seat.

24 THE COURT: L-E-V-I-N-G --

25 THE WITNESS: -- S-T-O-N.

1 A Germany.

2 Q Okay.

3 A And when I came back, I went back to college and got a
4 job with another daily newspaper and worked there while I was
5 working my way through college. After getting the degree in
6 journalism and doing a couple of years of studying of
7 sociology and realizing that that wasn't going to be a career
8 for me, I applied for and got a job with the Federal
9 Government as a photo journalist in Columbus, Ohio.

10 Q Where in Columbus?

11 A It was at that time called Defense Construction Supply
12 Center. I think the name has changed over the years, but
13 that's what it was called when I worked there. I was there
14 about five years and got a -- a job as -- promotion as the
15 editor of a base newspaper at the Newark Air Force Base in
16 Newark, Ohio. And I worked there for 15 years. After about a
17 year as the editor, I was made the chief of the Public Affairs
18 Office. And --

19 Q And what was this entity?

20 A The Newark Air Force Base.

21 Q Okay. And where was that?

22 A Newark, Ohio.

23 Q Okay. Go ahead.

24 A After about 15 years there -- well, during that time --
25 at the end of that time the -- the base was closed through the

1 BRAC process.

2 Q What's the BRAC process?

3 A Base Realignment and Closure. It -- it's a process used
4 to select and close bases -- military bases. And during the
5 -- the base closure, I was the person in charge of
6 communicating to the workforce what was happening to them,
7 which for many of them this was the worse thing that ever
8 happened in their lives. And I think that's the high point of
9 my career. I did that job, and we had no workplace violence
10 and no suicides during the base closure. And that's almost
11 unheard of in a -- in a base closure.

12 At the end of that time, the work I did there had
13 been noticed and I was offered a job at Wright-Patterson Air
14 Force Base in the Air Force Material Command Headquarters,
15 where I worked the rest of my Government career of about 10
16 years as -- primarily as the Deputy Chief of Media Relations
17 for Air Force Material Command.

18 Q And when did you retire from your work with the Federal
19 Government?

20 A About six years ago.

21 Q Now, in addition to your career in the Federal Government
22 and as a photo journalist in the various newspapers, is there
23 another form of photography that you have taken and advanced?

24 A Well, I've done pretty much everything that's possible to
25 do with photography. That's the -- the job was a job, and

1 age, over the age of 18?

2 A Yes, always.

3 Q And do you have any interest at all in using any models
4 who are minors?

5 A Quite the contrary. I prefer older models.

6 Q Okay. And are you opposed to using minors in sexual
7 images?

8 A Absolutely.

9 Q Now, has any of your work been exhibited?

10 A Frequently in many places, yes.

11 Q And what are some of the places where your work has been
12 exhibited?

13 A In shows in galleries in Florida, in Vermont, California,
14 Los Angeles, Chicago, Detroit, the Lexington Art League Annual
15 Nude Show, the Kinsey Institute. I have -- working a current
16 show that's up right now at the Kinsey Institute. And I've
17 been shown in Chicago, and have a show opening there on June
18 15th. Many other places; I've been shown in Europe as well.

19 Q Now, how do you obtain your -- your subjects?

20 A Most of them are people I know. I meet -- I find models
21 through some of the modeling sites online, but primarily
22 models tend to find me. I'm fairly well known for my work in
23 the community with people who do this kind of work. And often
24 the models will see what I do and want to be part of it and
25 contact me.

1 but, you know --

2 Q Okay. And -- so tell the Court what happens at a
3 particular shoot. Take -- take us through the shoot of a
4 model out in nature.

5 A Okay. Usually, I like to shoot at dawn. So we start
6 around 4:00, 5:00 in the morning, depending on when the sun's
7 coming up. And I collect the model and my gear and we go to a
8 -- a location outdoors that is a place that we expect to be
9 private and not disturbed and wander around in the woods or
10 the deserts or wherever this happens to be, until I see a
11 place that seems to me to require a female figure to be added
12 to the photograph, and I'll send a model to the spot that I
13 want her to be in and take some pictures.

14 Q And then how many -- how many images do you create at a
15 given shoot?

16 A There's no set number. It varies greatly, but it's not
17 uncommon for it to be several thousand, because we'll do a
18 number of different places in the course of a day.

19 Q Okay. Now, have you published any book of your work?

20 A Yes, I have published a book.

21 Q And what's the name of the book?

22 A The Figure in Nature.

23 Q Okay. Showing you on the screen a copy of Plaintiff's
24 Exhibit of -- not a copy, actually, Plaintiff's Exhibit 66.
25 Can you identify that?

1 A Yes. That's my -- the cover of my book.

2 Q And what have you published inside that book?

3 A Photographs of nudes in natural settings.

4 Q And I see that was published in '05?

5 A That's right. I need to do something new. This -- this
6 is all older work.

7 Q But that's an example -- just goes through some of the
8 examples. These are all your photographs?

9 A Yes.

10 Q That one?

11 A Yes.

12 Q That one?

13 A Yes.

14 Q That one?

15 A Yes.

16 Q And these are what you call photographs in nature?

17 A Yes.

18 Q What is the artistic message of these photographs?

19 A Well, I don't know. I -- I like to make beautiful
20 photographs. I -- I think that beauty is a good thing and
21 -- so when I've created something beautiful, I've, in some
22 small way, added to the sum total of beauty in the world, and
23 that's not a bad thing. Also, there -- there can be a -- I
24 like the viewer to bring their own interpretation, but I think
25 that many of the photographs do show the relationship of the

1 figure and the natural environment and gets to that idea that
2 we derive our -- our definition of beauty from the female
3 figure.

4 THE COURT: Just let me interrupt you. I just want
5 to be sure I understand your legal position about this,
6 because assuming that one would say these are not lascivious,
7 these were made in 2005. So you're saying that when they were
8 made in 2005, they were subject to the statute, but they --
9 they would not be after 2009?

10 MR. MURRAY: Actually, no, Your Honor. I'm just
11 giving the background right now of the kinds of photographs he
12 takes and then I'll move in to what happened as --

13 THE COURT: Okay. All right.

14 MR. MURRAY: -- as his career progressed.

15 THE COURT: Okay. Thank you.

16 BY MR. MURRAY:

17 Q Now, there came a time, Mr. Levingston, when in 2009 --
18 well, first of all, are you familiar with 2257?

19 A I -- somewhat, yes.

20 Q Okay. And are you familiar with the fact that in about
21 2009 the law was expanded to include simulated sexual acts as
22 well as lascivious exhibition of the genitals?

23 A Yes. Actually, I -- I really wasn't aware of 2257 until
24 2257(a). And I became aware of it, it could apply to my work.
25 2257 does not apply to my work.

1 I don't understand how the records are supposed to be
2 maintained. It -- it's incomprehensible to me. And,
3 therefore, I'm sure that if I tried to maintain them, I would
4 mess it up. I'm not good with record-keeping.

5 I'm also not willing to be subject to warrantless
6 searches. And I consider that a serious violation of my
7 constitutional rights, simply because I'm expressing myself as
8 an artist, now I would have to be willing to allow warrantless
9 searches of my home or studio unannounced. And I can't be
10 available 20 hours a week, as the law requires, to allow those
11 inspections. I would never be able to leave. I could never
12 do my work if I had to stay around and wait for an inspector
13 to possibly show up at my home.

14 I'm also not willing to publish my home address and
15 name out there on the internet for any nut job with an AK-47,
16 who might be offended by what I do, to come and attack my
17 -- me and my family. I feel it's unsafe.

18 Q Are you familiar with the fact that if you did comply
19 with 2257, you would have to put a -- a label on each one of
20 your images?

21 A That's what I understand.

22 Q And would you -- how would you do that with respect to,
23 say, the 2 or 3,000 digital images that you take in a given
24 shoot?

25 A I have no idea how I can do that. I don't know how it's

1 even possible.

2 THE COURT: Excuse me one minute.

3 (Pause)

4 THE COURT: Go ahead.

5 BY MR. MURRAY:

6 Q Are you aware that the law would permit you to use a
7 third-party record-keeper so you wouldn't have to keep them at
8 your home?

9 A I'm aware of that.

10 Q And why wouldn't you do that?

11 A Well, for one thing, it would cost money. And I don't
12 make any money from my photography. I suppose if I wanted to
13 shoot pornography, I could. But there is no market of any
14 significance for the kind of work that I do. Also, I'm not
15 willing to take the risk of a third-party not doing the job
16 properly and me being criminally liable for that.

17 Q Now, are there any particular projects beyond the shoots
18 that you currently do that you were interested in doing that
19 you have refrained from doing because of 2257(a)?

20 A Yes. I -- I have work in the permit collection of the
21 Kinsey Institute and have -- as I mentioned, have work being
22 shown there right now. And I have a -- a friend who is a
23 former prostitute who's now an author. And she is interested
24 in a project where she and I would interview and photograph
25 former and current prostitutes about their experience working

1 as a prostitute. I cannot imagine a -- a way that we could do
2 that without the photographs possibly crossing the line into
3 2257(a).

4 The Kinsey Institute, incidentally, is interested in
5 this project and thinks it could be something valuable to add
6 to their archives. But I will not begin that project while
7 this law is in effect. It would prevent me from doing it
8 properly or without having to -- to submit to all the
9 requirements of the record-keeping that I'm not willing to do.

10 Q Do you make sure that anyone that you photograph is above
11 the age of 18?

12 A I do.

13 Q And how do you make sure of that for anybody who -- well,
14 how do you make sure of that?

15 A Well, if I don't know they're above 18, I would check
16 their ID. Since this law came into effect, I always check ID,
17 and I make a copy of the ID.

18 Q Okay. Have you ever used anyone under age?

19 A No.

20 Q And do you have any desire to ever use anyone under age
21 in your nude photos?

22 A Never.

23 MR. MURRAY: That's all I have, Your Honor, other
24 than to offer into evidence Plaintiff's Exhibits 65, 67, 68,
25 and 66.

1 THE COURT: All right. They've been admitted.
2 Cross-examine.

3 CROSS-EXAMINATION

4 BY MS. BLADUELL:

5 Q Good morning, Mr. Levingston.

6 A Good morning, Hector.

7 Q It is correct to say that today you don't produce any
8 work falling under 2257 or 2257(a), correct?

9 A I endeavor to not do that, yes.

10 Q And you have -- well, you've testified on direct that you
11 have a wide range of interest in photography, correct?

12 A That's true.

13 Q In 2002, you started focusing on taking pictures of -- of
14 nude women in nature, correct?

15 A That's true.

16 Q Currently, however, you are focusing on two projects that
17 do not involve photographing nude women, correct?

18 A I have two projects underway, in addition to doing nudes,
19 yes.

20 Q And one of these projects is documenting the environment
21 in old news rooms, correct?

22 A I'm sorry.

23 Q One of these projects that you're focusing on right now
24 is documenting the environment in old news rooms?

25 A It's a project interviewing and doing portraits of people

1 who worked in newspapers in the olden days when I was doing
2 that.

3 Q And that involves traveling around, photographing, and
4 interviewing people who worked in the old news rooms?

5 A Yes.

6 Q This project is not going to involve nudes, correct?

7 A That's correct.

8 Q The second project, you would describe it as
9 photographers today as a reaction to digital photography?

10 A Well, the second project is photographers who use old
11 processes -- alternative processes often making their own
12 materials and -- and photographing with usually Nineteenth
13 Century photographic processes. It's a similar project in
14 interviewing and photographing them and talking with them
15 about why they do that kind of work.

16 Q And this project also is not going to involve any nudes,
17 correct?

18 A No, it could, but it's not a primary reason for the
19 project. Some of those photographers shoot nudes so that --
20 that could enter into it through that.

21 Q So you would be -- you would include the picture that
22 takes of nude, right?

23 A Yes.

24 Q But you would not take pictures of them posing nude,
25 correct?

1 A No. It depends on what they look like. Not likely.
2 Actually, one of my models is one of those photographers,
3 so --

4 Q So she could be?

5 A Right.

6 Q But you don't have any plans right now to photograph her
7 nude, correct?

8 A Actually, yes, next week.

9 Q This one?

10 A That -- that particular model is going to model for me
11 next week.

12 Q In connection with this project?

13 A No.

14 Q This is something -- another project that you have?

15 A Yes. Correct.

16 Q Now, of course, you're concentrating on the projects, but
17 as you've testified, you're not completely done doing nude
18 work, correct?

19 A I don't think I ever will be.

20 Q And, in fact, you're no longer using models for your
21 primary photo work, correct?

22 A I'm not using models for these other two projects.

23 Q And you've changed the direction of your work and you're
24 no longer seeking new models, correct?

25 A Well, I do seek new models.

1 Q Mr. Levingston, you have a profile in Model Mayhem,
2 correct?

3 A Yes.

4 Q And if I can show you Exhibit -- I'm going to show you
5 this document, DL-15. It's -- it's something that you saw in
6 your deposition?

7 A Right.

8 MR. BLADUELL: And we can see the first two -- the
9 first three sentences highlighted on the screen.

10 BY MR. BLADUELL:

11 Q The first four?

12 A Yes.

13 Q Okay. So this document says -- this is your docu -- this
14 is your profile --

15 A Yes.

16 Q -- of Model Mayhem, correct?

17 A Yes, it is.

18 Q And Model Mayhem is a place where you would contact new
19 models?

20 A Yes.

21 Q And here, you say, "I am no longer using models for my
22 primary photo work. I have changed the direction of my work.
23 I'm no longer seeking new models. The bulk of my new work
24 does not involve models"?

25 A Yes.

1 Q There --

2 MR. MURRAY: Objection, Your Honor. Unless he means
3 the last sentence of the last paragraph.

4 THE WITNESS: Yes, there's more on there.

5 MR. BLADUELL: We -- we've --

6 THE COURT: Well, wait, wait, wait. Just include
7 the next paragraph.

8 BY MR. BLADUELL:

9 Q Yeah. "I plan to continue to shoot some new models using
10 many models I've worked with, but this is no longer the main
11 thing I'm doing with the photography"?

12 A Right.

13 Q And that's accurate, correct?

14 A No.

15 Q You've decided after this -- after you posted this, you
16 decided to --

17 A No, the -- the purpose of this statement is to discourage
18 new models from contacting me.

19 Q But you -- but you stated this in your Model Mayhem?

20 A True. Correct.

21 Q Okay.

22 A I've -- I've always had a statement on Model Mayhem
23 designed to keep models from contacting me, because there are
24 many, many models that I have no interest in that would
25 contact me almost on a daily basis.

1 Q Now --

2 A So I put up a -- a profile to discourage that.

3 Q The reason that your new work does not involve new models
4 is that you've decided to concentrate on the two projects,
5 journalism and alternative process photographers, correct?

6 A Those are projects I'm concentrating on, but not to the
7 exclusion of shooting nudes.

8 Q But that's the reason -- the reason why your new work is
9 not going to involve new models is because you are
10 concentrating on these two new projects, correct?

11 A No. No.

12 Q Mr. -- Mr. Levingston, did you take a deposition in this
13 case?

14 A I did.

15 Q In -- in March?

16 A Yes.

17 Q And this was in Ohio?

18 A Yes.

19 Q And your attorney was there?

20 A Yes.

21 Q And you took an oath to tell the truth?

22 A Yes.

23 Q And you told the truth?

24 A I did.

25 Q Now, let me show you page 138 of your deposition

1 transcript.

2 MR. BLADUELL: And if we can highlight lines 3 to
3 18.

4 BY MR. BLADUELL:

5 Q And I'm going to read it for the record.

6 Q "And is it accurate what is in this document that the
7 bulk of my new work does not involve new models?

8 A Yes.

9 Q And the reason for that is that the projects that you're
10 interested in doing, the ones that you described before about
11 journalism and the funerals do not involve depiction of
12 models?

13 A It's journalism and alternative process photographers.

14 Q I'm sorry, thank you for correcting me.

15 A Yes, nobody gets naked in those pictures.

16 Q Did you decide to shift attention to those projects
17 because it was burdensome to the nude models?

18 A No."

19 MR. MURRAY: Objection, Your Honor. There's nothing
20 inconsistent with -- between that and what he just said.

21 THE COURT: Overruled.

22 BY MR. BLADUELL:

23 Q Now, let me ask --

24 A May I -- may I point out --

25 THE COURT: Well, let him answer the question.

1 THE WITNESS: The -- the question the -- my new
2 work. You were asking me about my new projects. And, yes,
3 they do not involve nude models. But I'm also doing other
4 work that I've been doing for 12 years that does include nude
5 models. That's the distinction here.

6 BY MR. BLADUELL:

7 Q You talked about being approached by a former prostitute
8 on direct?

9 A Yes.

10 Q And -- to work on a project involving -- potentially
11 involving sexual explicit depictions?

12 A Potentially, yes.

13 Q And you were approached by this person in 2012?

14 A I think it was in 2012.

15 Q And you've -- you've talked to this person a few times
16 about this project, correct?

17 A Many times. She's a friend.

18 Q But this book is in a conceptual stage, correct?

19 A And I didn't --

20 Q This -- this project --

21 A I didn't say it would be a book; it's a project.

22 Q Okay. I'm sorry.

23 A The final form is -- is undetermined.

24 Q This project is nowhere near specific at this point,
25 correct?

1 A That's correct.

2 Q This project can take many forms, correct?

3 A It could.

4 Q And you don't have any plans right now to take pictures
5 for this project, correct?

6 A No, because of 2257(a).

7 Q And, in fact, if the book includes photographs, you don't
8 know if the photographs will be subject to 2257 or 2257(a),
9 correct?

10 A I think it's quite possible some would be.

11 Q But you don't know at this point?

12 A No.

13 Q And you're probably not going to include the names of the
14 -- of the prostitutes that you're going to interview in this
15 book, correct?

16 A That's one of the issues. We would have to promise to
17 protect their identities. And that would be impossible while
18 complying with 2257(a).

19 Q But the question was, you're not going to publish the
20 names in the book itself, correct?

21 A I don't know that there'll be a book, again.

22 Q Or in the project?

23 A No, their names would most likely not be included unless
24 they were willing to have them included.

25 Q Now, you've -- you've -- you do not keep 2257 records,

1 correct?

2 A I do not.

3 Q But you have a -- a studio in Ohio -- in Dayton, Ohio,
4 correct?

5 A Yes.

6 Q And in this studio you keep IDs and model releases of
7 your models?

8 A Yes.

9 Q And you share this studio with two other photographers,
10 correct?

11 A I do.

12 Q And one of these photographers is a commercial
13 photographer that doesn't do nudes, correct?

14 A That's true.

15 Q And one of them does nudes?

16 A Yes.

17 Q Now, when you travel for -- for work, these photographers
18 that are in the studio do not go with you to do the -- on your
19 shoots, correct?

20 A No.

21 Q And the photographer in there that does commercial work,
22 he doesn't travel often, correct?

23 A He does travel.

24 Q For -- for work?

25 A I -- I really don't know his schedule, but he does

1 travel. I know he's been on several trips since he's been in
2 the studio.

3 Q You're married, correct, Mr. Levingston?

4 A I am.

5 Q When you go shoot nudes, does your wife travel with you?

6 A No.

7 Q And you keep the model -- the model releases and the ID
8 in a desk drawer in your studio?

9 A I do.

10 Q This desk drawer is not locked?

11 A It is not.

12 Q When you -- when you photograph nude models, you take a
13 picture of their ID, correct?

14 A These days, yes.

15 Q And you keep it in your computer?

16 A Yes.

17 Q Taking a picture of the ID is not burdensome, correct?

18 A No.

19 Q And keeping that ID in your computer is not burdensome
20 either?

21 A No.

22 Q Now, you've -- you've produced material with -- nude --
23 nude material with women 18 and above, correct?

24 A Yes.

25 Q And you've produced a very small amount of material from

1 2005 to 2009 that you think would have been subject to
2 2257(a)?

3 A Yes.

4 Q Now, you say that you stopped doing sexually explicit
5 work after 2257(a) took effect, correct?

6 A I've never done sexually explicit work, but simulated.

7 Q Simulated?

8 A Yes.

9 Q And you are aware that 2257(a) took effect on March 18,
10 2009?

11 A Yes.

12 Q Let's go, please, Exhibit 90C. Mr. Levingston, you
13 recognize this exhibit as a list that you provided the
14 Government --

15 A Yes.

16 Q -- of your models, the models that you have shot in
17 sexually explicit -- simulated sexually explicit depictions?

18 A Yes.

19 Q And the first photo shoot on this list is November 18,
20 2009?

21 A Yes.

22 Q And that was obviously after March 19, 2009?

23 A Yes.

24 Q When 2257(a) took effect?

25 A Yes.

1 Q If we go to the second page of this Exhibit 90C. Those
2 are -- and then the third page. And the fourth page. So
3 there are 18 models -- there are 18 photo shoots listed here,
4 correct?

5 A Yes.

6 THE COURT: One second.

7 (Pause)

8 THE COURT: Okay. Just -- just one second.

9 MR. BLADUELL: Sure.

10 (Pause)

11 THE COURT: All right. Here, just one minute. I
12 have a motion for a temporary restraining order in another
13 case, so just -- well -- can counsel come up, please.

14 (Pause)

15 THE COURT: Go ahead.

16 BY MR. BLADUELL:

17 Q Let's go to the first page of Exhibit 90C, please. So
18 this -- Mr. Levingston, so that we can understand this
19 document, this is a list that you provided the Government of
20 the photo shoots involving sexually explicit -- simulated
21 sexually explicit conduct between 2005 and 2009, correct?

22 A Right.

23 Q And one of the -- item 6 at the bottom -- why don't --
24 the model listed there has a date of birth of 7/27/1983?

25 A Yes.

1 Q And the photo shoot was December 9, 2008?

2 A Yes.

3 Q Does that make her 23?

4 A If you -- if that is good math. I'm not good at it.

5 Q Okay. Well, let's go to --

6 MR. MURRAY: Objection, Your Honor.

7 BY MR. BLADUELL:

8 Q Let's go to the fourth page of this Exhibit 90C. The
9 fifth page, I'm sorry. You recognize this picture, Mr.
10 Levingston?

11 A Yes, I think so.

12 Q It's one of the ones you took?

13 A Probably.

14 Q And you see up top that it has a number, number 6?

15 A Yes.

16 Q And you -- you've provided this to the Government?

17 A Did I? I -- maybe. I -- I won't swear to that.

18 Q If you go to --

19 A You asked for a lot of stuff. I don't remember all of
20 it.

21 Q But this is a picture that you took?

22 A I think so.

23 Q If we go to the second page of this Exhibit 90C. In
24 number 8, the date of -- the date of birth is 8/27/87?

25 A Yes.

1 Q And the shoot day was 12/22/09?

2 A Yes.

3 Q And we can calculate the age with those two --

4 A Right.

5 Q -- with those two dates? So Mr. Levingston, aside from
6 your simulated work that you feel would have been covered by
7 2257(a), you have produced nude photographs of women who are
8 18 years old, correct?

9 A Women who are 18 years old?

10 Q Who are -- yeah, who are -- who are 18?

11 A It's possible, but very unlikely. There may be a -- a
12 model or two that was 18, but not very many. That doesn't
13 happen often.

14 Q And you've -- you've produced nude photographs of women
15 19 years old, correct?

16 A That's possible, also.

17 Q You don't know for sure?

18 A No, I don't.

19 Q Okay. Let's go to Exhibit 90B. And if we go to the
20 second page of this Exhibit 90B. Mr. -- Mr. Levingston, you
21 -- as you said, we requested a lot of pictures?

22 A Yes.

23 Q And you've provided a lot of pictures, correct?

24 A Yes.

25 Q Is this one of the ones that you provided?

1 A I believe -- well, I -- I'm not sure where you got it,
2 but it is one of my pictures.

3 Q It is one of your pictures. And let's go to the next
4 one, please. That's another one of your pictures --

5 A Yes, it is.

6 Q -- correct? And the third one, that's another one of
7 your pictures --

8 A Yes.

9 Q -- correct?

10 THE COURT: Well, do you have a position whether
11 these are covered by the statute?

12 MR. BLADUELL: I'm just -- I'm just establishing the
13 ages of performers. Oh, do -- does the Government have a
14 position?

15 THE COURT: Yes.

16 MR. BLADUELL: I don't think I can give a definitive
17 answer as to --

18 THE COURT: You what?

19 MR. BLADUELL: I don't think I can speak to the
20 Government as to that right now.

21 THE COURT: Okay. All right. Go ahead. Would it
22 depend on whether they were produced before 2009 or after
23 2009?

24 MR. BLADUELL: Well, yes, Your Honor, the -- I mean,
25 the -- the regulations specify what -- when the pictures were

1 taken. And there's a day when they would apply -- when the
2 regulations would apply and would not apply.

3 THE COURT: Okay.

4 MR. BLADUELL: This -- this particular picture is --
5 I'm not -- if we go to the first page of this exhibit, we can
6 see when they were taken. And if they included conduct that
7 would have been subject to the statute, then it would have.

8 THE COURT: All right.

9 BY MR. BLADUELL:

10 Q So this -- this first page is a table, correct?

11 A Yes.

12 Q And it lists dates of birth and shoot dates, correct?

13 A Yes.

14 Q Okay. And you've identified the pictures after this --
15 after this page that you've taken, correct? The --

16 A Yes.

17 Q Okay.

18 MR. BLADUELL: I move to admit 90B.

19 BY MR. BLADUELL:

20 Q Now, the model releases that you provided the Government
21 included the age of the performer?

22 A Yes.

23 Q Or I'm sorry, the age of the model?

24 A Yes.

25 Q And they contain the date of the shoot, correct?

1 A Yes.

2 Q Now, if we go to Exhibit 89C, this is a photo ID from
3 Florida, correct?

4 A It appears to be, yes.

5 Q You recognize the person in this ID?

6 A Yes, I think I do.

7 Q It's a -- it's a model that you have -- you have done
8 pictures of --

9 A I -- I worked with --

10 Q -- you have taken pictures of?

11 A I worked with her one time, yes. I can only say that
12 because it's Florida, and I -- yeah.

13 Q Okay. And if we go to the second page. It's a model
14 release, correct?

15 A Yes.

16 Q From you?

17 A Yes.

18 Q And it states that she's 18?

19 A Yes.

20 Q Now, the date of birth is 12/21/1990?

21 A Yes.

22 Q And the model release is September 1, 2009?

23 A Yes.

24 Q Now, this -- this woman had just turned 18 a couple of
25 months before you -- she signed the release, correct?

1 A Is that right? Or was she about to turn 19? I'm not
2 sure.

3 Q Now, let's -- if we go back to 90B, on this table you see
4 a number 11?

5 A Yes.

6 Q And the date of birth is 12/21/1990?

7 A Yes.

8 Q And the shoot date is 9/1/09?

9 A Yes.

10 Q And if we go to the last -- the last page of this Exhibit
11 89. Let's go back to -- let's go back to the first page of
12 90B. And let's just continue going through the papers -- the
13 pages, please. The next one. No. Yeah. The next one.
14 Number 11. Yes. And you recognize this as a picture that
15 you've taken?

16 A Yes.

17 Q And is that the model that I showed you the ID of?

18 A Yes, it is.

19 Q Now, in this photo shoot you took more than this picture,
20 correct?

21 A Yes.

22 Q You took probably thousands of pictures?

23 A Possibly. I don't think it was that -- that many on that
24 particular shoot, but --

25 Q If we go to Exhibit 89B, please. This is a -- you

1 recognize this to be an ID of -- of one of your models?

2 A Yes, I think so. I don't recognize the -- the model, I'm
3 sorry.

4 Q Okay. And if we go to the second page. A model release
5 from you, correct?

6 A Yes.

7 Q And the date of birth is 5/30/1987?

8 A Yes.

9 Q Current age 19?

10 A Yes.

11 Q And if we go back to the first page of this Exhibit 89B.
12 And we -- we focus in on the date -- date of birth. It says
13 May 30, 1987?

14 A Yes.

15 Q Now, if we go back to Exhibit 90B. And we see number 7
16 here on this table?

17 A Yes.

18 Q And the date of birth is 5/30/1987?

19 A Yes.

20 Q And if we go to the next page of this Exhibit 90B. And
21 so -- yeah. And that's a picture that you took?

22 A Yeah. Yes, it is.

23 Q And do you recognize that it's a model that I showed you
24 the ID of?

25 A No, I don't. I don't --

1 Q You think it's different?

2 A I -- I think it's different.

3 Q It's a -- it's a different model?

4 A Yeah. I know her. I know who that is. I don't
5 recognize the picture on that passport, and so I'm -- I'm not
6 sure if it's the same person.

7 Q The -- okay. Next, go to 89A, please. This is -- do you
8 recognize the model?

9 A Yes.

10 Q And the second page is a model. This is Exhibit 89A. Do
11 you recognize a model release?

12 A Yes.

13 MR. BLADUELL: I move that into -- Exhibit 89A into
14 evidence.

15 BY MR. BLADUELL:

16 Q Mr. Levingston, you've also photographed women nude
17 before they went to college, correct?

18 A Yes.

19 Q You don't restrict the models that you photograph nude to
20 people over 25?

21 A No, I do not.

22 Q You work with models of all ages, as long as they're
23 reasonably fit?

24 A Well, adults, yes.

25 Q 18 and above?

1 A Yes.

2 Q Let's go to Exhibit 91A, please. Okay. So 91A is a
3 photo you've taken?

4 A Yes.

5 Q And 91B is a photo you've taken?

6 A Yes.

7 Q And 91C?

8 A Yes.

9 Q These photographs are representative of your nude work?

10 A Yes.

11 Q You don't consider that these photographs are subject to
12 2257 or 2257(a)?

13 A I do not.

14 Q And you took these pictures in approximately 2009?

15 A No, those --

16 Q Oh, I'm sorry, strike that. 2012?

17 A Yes.

18 Q And, of course, that was after 2257(a) --

19 A Yes.

20 Q -- was enforced?

21 A Yes.

22 Q So you have not stopped producing nudes because of
23 2257(a) or 2257 -- 2257(a)?

24 A No, I have not.

25 Q These models in these exhibits, 91A, 91B, 91C, are all in

1 their mid 20s?

2 A Not all. I think, you know, you had one picture there
3 with four models. And one of those models is in her 30s and
4 has several kids.

5 Q Okay. The other ones around 90 -- I'm sorry --

6 A Mid -- mid 20s.

7 Q -- the other ones are around 20?

8 A Mid 20s.

9 Q Let's go to Exhibit 90A, please. Mr. Levingston, you
10 testified on direct that you took this picture, correct?

11 A Yes.

12 Q And that after 22 -- after 2257(a) became effective, you
13 removed this picture from your website?

14 A Yes.

15 Q And do you believe that this picture depicts sadistic
16 behavior?

17 A No.

18 Q But you removed it because other people told you that it
19 could be interpreted?

20 A I felt that some people could feel that this was
21 simulated sadomasochistic behavior.

22 Q But you, yourself, do not --

23 A I do not --

24 Q -- believe that this is --

25 A I do not believe that. I -- I disagree with that point

1 of view, but I'm erring on the side of caution because there's
2 felony involved here.

3 Q Now, let's go back to Exhibit 91A, please.

4 A Incidentally, that model is in her mid 40s, since you're
5 focusing on age of models.

6 Q You do not -- I'm sorry, Exhibit 91A, Mr. Levingston, if
7 someone is looking at that picture, that person is not going
8 to be able to say the exact age of those models, correct?

9 A Correct.

10 Q And if you don't know these models, you would not be able
11 to tell their age, correct?

12 A I can tell they're over 18.

13 Q But you would not be able to detect their exact age,
14 correct?

15 A No.

16 Q And, Mr. Levingston, you would agree with me that
17 sometimes it is difficult to tell apart a 17-year-old and a
18 19-year-old, correct?

19 A Yes.

20 Q And the way not to confuse 17-year-olds and 18 -- 18-
21 year-olds and 19-year-olds -- I'm sorry, let me start again.
22 The way not to confuse 18-year-olds -- years old and 19-year-
23 olds with minors is checking their ID?

24 A Yes.

25 Q Now, your book The Figure of Nature was introduced into

1 evidence, correct?

2 A Yes.

3 Q And you don't believe that those pictures in there are
4 subject to the statutes, correct?

5 A No. And, of course, they were all produced long before
6 the statute took effect.

7 Q Do you feel that some of them would be subject to the
8 statutes?

9 A No.

10 Q If -- had the statute been enforced?

11 A No.

12 MR. BLADUELL: No further questions, Your Honor, at
13 this time.

14 THE COURT: All right. Redirect?

15 REDIRECT EXAMINATION

16 BY MR. MURRAY:

17 Q Mr. Levingston, you were shown what I think was
18 Government Exhibit 900. Maybe not. 90D, I'm sorry. There
19 was a photo -- an Exhibit 90, I guess, that showed a list of
20 18 photo shoots that you provided to the Government. Do you
21 remember that list?

22 A Yes.

23 Q Okay. And those were a list of the photo shoots that you
24 had done between -- the latest of which was '09 and previously
25 that had images that were -- were -- that you regarded to be

1 simulated sexual conduct?

2 A That I -- I felt could be interpreted that way.

3 Q And are those the kinds of images that you no longer
4 take?

5 A Yes.

6 Q And is 2257(a) the only reason that you no longer take
7 those kinds of images?

8 A Yes.

9 MR. MURRAY: Thank you.

10 THE COURT: Recross?

11 MR. BLADUELL: No recross, Your Honor.

12 THE COURT: All right. Thank you.

13 All right. Thank you.

14 THE WITNESS: Thank you, sir.

15 THE COURT: Okay. All right. It's 12:20. We have
16 no more witnesses, right?

17 MR. MURRAY: That's correct, Your Honor.

18 THE COURT: All right. I -- I want to address the
19 issue of the Joyner deposition today. Do you need some time
20 to look over the memo in cases that Ms. Wyer presented this
21 morning?

22 MR. MURRAY: Yes, but not long. But I --

23 THE COURT: Well, I do. What?

24 MR. MURRAY: No, I do, Your Honor, but I don't need
25 very long. I -- I also want to submit to you the alternative

1 grounds upon which we would --

2 THE COURT: Yes. Well, we're going to have a -- a
3 discussion about this.

4 MR. MURRAY: Yes.

5 THE COURT: The question is when to do it. So --

6 MR. MURRAY: Whenever you want. I'm -- I mean --

7 THE COURT: Well, I'm thinking about 2:00 or 2:30.
8 What's your -- would you want to put the paralegal on about
9 the summary exhibit today or tomorrow?

10 MR. MURRAY: We're prepared to do it today, if
11 that --

12 THE COURT: I would rather do it today for a lot of
13 reasons that have nothing to do with this case. Can we do it
14 -- so let's do this. I have some other things pending. Let's
15 reconvene at 2:30. And I may be stuck on this TRO. If I
16 can't turn to this case immediately, I'll do it as soon as I
17 can. And -- so then we'll have the discussion about the
18 Joyner deposition, and we'll then have the testimony about the
19 paralegal -- by the paralegal about the admission of the
20 summary. Is that all right?

21 MR. MURRAY: That be great, Your Honor.

22 THE COURT: All right. So I'll see you all at 2:30.

23 Janice, would you ask the lawyers in the TRO case to
24 come in, please.

25 (Recess taken, 12:15 p.m. to 3:12 p.m.)

1 THE COURT: Okay. Good afternoon. One second.

2 (Pause)

3 THE COURT: Okay. All right. Thank you for your
4 patience. All right. As I understand it, we have two issues
5 on the table this afternoon. One is the issue of Agent
6 Joyner's deposition, which the plaintiffs want to introduce in
7 its entirety, and the Government objects. And then the other
8 would be the summary prepared by a Government paralegal -- I'm
9 sorry, I don't know the young lady's name, but we'll get it in
10 a minute -- and whether that's admissible or not; is that
11 correct?

12 MS. WYER: Yes, Your Honor.

13 THE COURT: That's what we're here for?

14 MR. MURRAY: Yes.

15 THE COURT: Okay. All right. Now, Mr. Murray, why
16 don't you start by telling what reasons you believe the Joyner
17 deposition should be admissible.

18 MR. MURRAY: Yes, I will, Your Honor.

19 THE COURT: And I guess Rule 32 is our guidepost?

20 MR. MURRAY: It is. We have relied up until now
21 upon Rule 32(a)(4), which provides that we can use a
22 deposition for any purpose of a witness if the witness is more
23 than 100 miles from the place of hearing or trial. On its
24 face, the rule is clear. If -- if we just go by what the
25 plain language of the rule is, Agent Joyner is more than 100

1 miles away. We have the deposition. The Government fully
2 represented him. And -- and the rule --

3 THE COURT: All right. But -- but there are some
4 cases, included some of the ones cited by the Government, that
5 where it's clear that a witness is going to appear at trial,
6 the witness is not unavailable. And this whole rule is about
7 the witness being unavailable.

8 Now, most of those cases, I grant you, is where the
9 same party that is going to call the witness live also wants
10 to use the deposition. And now, some Judges have said you
11 can't do that. What I -- what I did see immediately is where
12 it was the opposing party that wants to use the deposition
13 before the witness appears live, which is what your situation
14 is.

15 MR. MURRAY: Yes. And --

16 THE COURT: All right.

17 MR. MURRAY: And I just think that the plain
18 language of the rule applies here. I don't think those cases
19 should control the outcome here. They're not binding on this
20 Court, obviously. The other thing is --

21 THE COURT: Well --

22 MR. MURRAY: -- the type of witness we're talking
23 about is a little bit different from the ones they were
24 talking about, which brings me to the alternative basis upon
25 which we could introduce the deposition, which, I think, also,

1 gives color to why it would be appropriate for Agent Joyner's
2 testimony to be admitted by way of deposition.

3 If we look at Rule 32(a)(2), it says that any party
4 may use a deposition to contradict or impeach the testimony
5 given by the deponent as a witness. I'm not relying on that.
6 But the next language says, "Or for any purpose allowed by the
7 Federal Rules of Evidence." When you go to the Federal Rules
8 of Evidence 801, you find that hearsay does not apply; that it
9 is not hearsay to introduce the admission of a party opponent,
10 as Your Honor, knows only too well.

11 And the way the rule defines an opposing party
12 statement now under the Federal Rules of Evidence 801(d)(2),
13 it states as follows. "It is not hearsay if the statement is
14 offered against an opposing party and" -- and I would rely on
15 (B) and (C) -- "is (1) the party manifested that it adopted or
16 believed to be true (C) was made by a person whom the party
17 authorized to make a statement on the subject."

18 Now, we're talking about FBI Agent Joyner. And his
19 testimony in his deposition was that he was the person who was
20 charged by the Government with setting up the inspection
21 program. And he did set up the inspection program. And he
22 was the who defined it and decided it how it was going to be
23 carried out. And then he carried it out largely by himself.
24 He had another agent with him who did some of the inspections.
25 He did, by far, the vast majority of the -- of the

1 inspections.

2 Now, the Government, in its motion for summary
3 judgment, filed a declaration by Agent Joyner. And they are
4 relying upon Agent Joyner as their representative for purposes
5 of what happened during those inspections. They have also
6 indicated by way of a declaration that they have in their
7 exhibit list for today for the trial, a declaration of Agent
8 Joyner in which, again, they affirm that they regard him to be
9 their representative for purposes of what happened.

10 THE COURT: Well, do you at all rely on 32(a)(3),
11 that Agent Joyner is a managing agent?

12 MR. MURRAY: We would like to, Your Honor. The
13 problem we have with that is that he is a retired agent.
14 And --

15 THE COURT: But he was --

16 MR. MURRAY: Yes, he was clearly --

17 THE COURT: Well, wasn't he in charge of this search
18 program --

19 MR. MURRAY: Yes.

20 THE COURT: -- at the time?

21 MR. MURRAY: At the time that he was employed by the
22 FBI, he was clearly entitled -- and he was clearly in charge
23 of --

24 THE COURT: Well, the rule applies to -- it says
25 who, when deposed, was the party's managing agent.

1 MR. MURRAY: Yes. And -- and so we -- I'm sorry,
2 yes, we do rely upon that for the same reasons that -- that we
3 regard it to be an admission that is admissible under Rule
4 801. So, yes, we rely upon --

5 THE COURT: Okay.

6 MR. MURRAY: -- Rule 32(a)(2) and Evidence Rule 801.
7 We rely upon 32(a)(3) for the same reasons that we think 801
8 applies. And we rely upon 32(a)(4)(B). And the last piece of
9 evidence to demonstrate that they have adopted him as their
10 representative and have manifested their agreement with his
11 testimony on what this was all about is the memorandum that
12 they just filed. Because on the last page they say as to a
13 reason why we shouldn't put in the deposition is because
14 they're going to call him as a witness.

15 And they say Mr. Joyner will testify for defendant
16 regarding the inspections that he participated in pursuant to
17 18, U.S.C., Section 2257. This is the same topic on which
18 plaintiffs wish to examine Mr. Joyner and which was addressed
19 at Mr. Joyner's deposition. And thus, they think it would be
20 inefficient for him to be presented by deposition as well as
21 by live testimony.

22 To be honest with you, if you're talking about
23 efficiency, one of the reasons I would prefer to introduce the
24 deposition is to spare the Court with what would ultimately
25 otherwise be a five or six hour cross-examination to duplicate

1 everything that occurred at the deposition.

2 THE COURT: Well, let me just say that if I agree
3 with you and I admit it, the Government can still call him as
4 a witness.

5 MR. MURRAY: Yes.

6 THE COURT: But -- and you can use the deposition to
7 impeach him if you want, but I'm not going to allow five or
8 six hours to repeat what -- what you've already covered in the
9 deposition.

10 MR. MURRAY: And -- and I wouldn't do it. I would
11 simply --

12 THE COURT: So -- so I think you ought to be on
13 notice, Mr. Murray, that if I agree with you about the
14 deposition, it's going to necessarily restrict your cross --
15 your cross.

16 MR. MURRAY: Yes. Unless he deviates from something
17 that he said.

18 THE COURT: Of course.

19 MR. MURRAY: Yes. No, I mean, that -- in fact,
20 that's one of the reasons --

21 THE COURT: But we're not going to have repetition.
22 All right. So, in a way, it may shorten the trial.

23 MR. MURRAY: That was one of the reasons why we
24 wanted to do it, Your Honor, is because other --

25 THE COURT: All right. I'm going to let the

1 Government do whatever they want because they're not bound by
2 that. But your cross would be restricted.

3 MR. MURRAY: Yes. Yes. No, I understand that.

4 THE COURT: Okay. Well, Ms. Wyer, I'd like your
5 response. And I'm -- I understand your position on
6 unavailability and you do have some case support for it as
7 something -- slightly different circumstances, but I'd most of
8 all like your reaction to 32(a)(2) and 32(a)(3).

9 MS. WYER: Your Honor, first of all, I'd just point
10 out that the Holbrook case is exactly on point because that
11 involved a case --

12 THE COURT: Well, the Holbrook case, I thought, was
13 where it was in -- the same party wanted to introduce it.

14 MS. WYER: No, Your Honor, that was where the
15 plaintiff wanted to introduce the witness and the -- introduce
16 the deposition, and the defendant was going to call the
17 witness -- the individual as a witness.

18 THE COURT: All right. Okay.

19 MS. WYER: So in regard to (a) -- (a)(3), Mr. Joyner
20 was not the Department of Justice's officer, director,
21 managing agent, or designee at the time of the deposition,
22 which was on April --

23 THE COURT: Well, wasn't he still employed at the
24 time of the deposition?

25 MS. WYER: No, he was not, Your Honor. He retired

1 several years ago.

2 THE COURT: He had already retired?

3 MS. WYER: Excuse me?

4 THE COURT: He had already retired?

5 MS. WYER: Yes, Your Honor.

6 THE COURT: Okay.

7 MS. WYER: So (a)(3) is clearly inapplicable, Your
8 Honor. In regard to whether Mr. Joyner -- I think we have to
9 look at the nature of the statements that plaintiffs are
10 trying to admit through this deposition. It kind of goes to
11 the objections that we would have otherwise, even outside the
12 context of Rule 32. I think one set of statements in there is
13 simply where plaintiff's counsel is reading things from the
14 FBI reports and Mr. Joyner is agreeing to the accuracy of what
15 was read.

16 To the extent plaintiffs are seeking to admit that
17 information, I think the reports themselves are being admitted
18 into evidence. There's no reason that Mr. Joyner's agreement
19 with the reading of those -- that material needs to be
20 admitted into evidence. There are --

21 THE COURT: Well, are those documents that he's
22 reading from -- are they already exhibits in the trial, or
23 will they be?

24 MS. WYER: Yes, Your Honor. And we've already
25 stipulated to the admission of those documents.

1 THE COURT: All right.

2 MS. WYER: There are also a subset of those
3 documents, which are the inspection reports for the
4 inspections that occurred, where Mr. Joyner was not even
5 present during those inspections. So Mr. Joyner has no
6 personal knowledge regarding anything that happened during
7 those inspections. Everything that -- when he -- when Mr. --

8 THE COURT: Well, then you're saying that a lot of
9 his testimony is based on hearsay?

10 MS. WYER: For those inspections it's all hearsay,
11 Your Honor -- Your Honor, for those, which are -- we have a
12 list in our exhibit list that itemizes which inspections were
13 conducted by Agent Joyner and which were conducted by Agent
14 Lawrence. So that's another set of material in the deposition
15 transcript that is entirely inadmissible. And then there's a
16 third category, where Mr. Murray -- plaintiff's counsel, is
17 essential asking Mr. Joyner, as a retired FBI agent, to agree
18 to various characterizations of the law and hypotheticals
19 regarding the law.

20 Now, Mr. Joyner, as an FBI agent implementing this
21 inspection program, was relying on -- on direction that he got
22 from FBI legal counsel. Mr. Joyner was not interpreting the
23 statutes and interpreting the regulations himself. He was
24 operating under instructions. And if he had any questions
25 about what to do, he would have gone to his authority and

1 asked. So he -- he is not authorized to make speculation
2 about what would have happened under different circumstances.
3 Another type of thing that plaintiff's counsel is trying to --
4 was trying to get Mr. Joyner to admit to was, in particular,
5 whether areas of the premises where the inspections occurred
6 were opened to the public or not.

7 Now, Mr. Joyner does not -- there was no foundation
8 for that kind of information. To the extent that plaintiff's
9 counsel is seeking to rely on -- on the photographs of the
10 inspections, those photographs are contained in the reports.
11 So I -- I think it's simply plaintiff's counsel is trying to
12 get this deposition admitted for inappropriate purposes. All
13 of the -- all of those statements about the legal
14 interpretation, I think, would -- would be inadmissible as
15 improper opinion because those are all -- require a kind of
16 legal expertise that Mr. Joyner simply does not have, and no
17 one in the FBI authorized him to speak on those matters.

18 THE COURT: Okay. All right. All right. Well,
19 thank you. Here's what we're going to do. If this was a jury
20 trial, I would read the transcript to decide this. And --
21 because there's no other way. I mean, you both have arguments
22 and I -- I think it may depend -- it may be that some -- some
23 of the testimony is admissible and some of it is not. Some of
24 it may qualify under 801 and some may not. Some may be
25 excluded as hearsay, some may be opinions -- legal opinions.

1 So I -- I'm not convinced that this is an all-or-nothing
2 situation. So I'm going to read the transcript tomorrow and
3 I'll -- when I come back Friday morning, I may have marked it
4 up and this is admissible, this is not. And that will be my
5 best judgment of what I ought to do. Is the transcript -- is
6 it in these -- any of these boxes back here? Or did you
7 submit it before? Or do one of you want to give me a copy?

8 MR. MURRAY: We have it here to submit, Your Honor.

9 THE COURT: All right. Could you hand it up and
10 I'll -- I don't know any other way to resolve it. What about
11 exhibits that were shown to him? Are they attached to the
12 transcript or --

13 MR. MURRAY: No, Your Honor, but I really don't
14 think -- and they are -- we can -- we have those, but I don't
15 think you'll need to actually see them --

16 THE COURT: All right. Fine.

17 MR. MURRAY: -- in order to understand the --

18 THE COURT: Well, let me look at it without the
19 exhibits.

20 MR. MURRAY: -- the testimony. And --

21 THE COURT: And we'll go from there. Okay?

22 MR. MURRAY: And, Your Honor, if you're not going to
23 do this until tomorrow, I will be glad to go back and see if I
24 can exclude some of the passages and --

25 THE COURT: Well, I would welcome that.

1 MR. MURRAY: -- and share that with Ms. Wyer --

2 THE COURT: Yes.

3 MR. MURRAY: -- so that you don't have to read the
4 whole thing. I'll address some of --

5 THE COURT: All right. Do you want to fax it to --

6 MR. MURRAY: We'll email it to you.

7 THE COURT: -- my chambers tomorrow morning?

8 MR. MURRAY: Yes. Yes. We will -- and we'll email
9 it to Ms. Wyer later today some passages that we'll exclude to
10 address --

11 THE COURT: All right.

12 MR. MURRAY: -- some of her objections and maybe
13 lighten the burden.

14 THE COURT: Well, that's a -- that would be a good
15 idea. And then -- okay. All right. I mean, it is 270 some
16 pages, so --

17 MR. MURRAY: Yes. It was a long day, Your Honor, I
18 assure you.

19 THE COURT: -- that would be -- that would be a good
20 idea. Okay.

21 MR. MURRAY: And -- and we do have the other
22 excerpts at some point that we may want to address of the --
23 the other three witnesses, the shorter excerpts.

24 THE COURT: Okay. All right. All right. Thank
25 you. So that's what we're going to do with this.

1 All right. Now, Ms. Wyer, do you want to present
2 the summary that you want to introduce and call your witness?

3 MS. WYER: Yes, Your Honor. Mr. Swinton will.

4 THE COURT: Okay. All right. Go ahead. Okay.

5 MR. SWINTON: For the record, Your Honor, we had
6 previously provided the Court with a copy of Defendant's
7 Exhibit 309, which was the second declaration of Adriana
8 Vecchio. And --

9 THE COURT: No, wait. Is your exhibit 309?

10 MR. SWINTON: It is, yes.

11 THE COURT: All right. Is it in the boxes back
12 here?

13 MR. SWINTON: It -- Your Honor, if you'll hold on
14 for one second, we -- we've amended this declaration and
15 submitted now Defendant's Exhibit 314.

16 THE COURT: 34 -- all right. Just -- just hand it
17 up to me.

18 MR. SWINTON: And the table that is attached is
19 Attachment A.

20 THE COURT: Okay. All right. Just let me read
21 this.

22 (Pause)

23 THE COURT: All right. So it's -- is it Exhibit A
24 that you object to?

25 MR. MURRAY: Yes, Your Honor.

1 THE COURT: All right. And what is the basis of the
2 objection?

3 MR. MURRAY: We wanted an opportunity to just --

4 THE COURT: I'm sorry.

5 MR. MURRAY: All we really wanted to do was have an
6 opportunity to ask some questions of Ms. Vecchio, so that we
7 had a better --

8 THE COURT: All right. Well, let's call her to the
9 stand.

10 MR. MURRAY: Yes.

11 THE COURT: All right.

12 MR. SWINTON: Sure. And the Government calls
13 Adriana Vecchio, Your Honor.

14 THE COURT: Okay.

15 MR. MURRAY: And, Your Honor, just as a matter of
16 efficiency, we have no objection to you submitting the
17 declaration and then just letting me ask my questions about
18 them, if you -- if you don't want to do a whole direct
19 examination.

20 THE COURT: Well, that's what we're going to do now.

21 MR. MURRAY: Okay.

22 THE COURT: I'm going to take the declaration and
23 you're going to ask the questions. And then we'll allow for
24 any redirect.

25 THE CLERK: Please raise your right hand.

1 ADRIANA VECCHIO, PLAINTIFF'S WITNESS, SWORN

2 THE CLERK: Please state your full name for the
3 record and spell your last name.

4 THE WITNESS: Adriana Vecchio, V, as in Victor, E-C-
5 C-H-I-O.

6 THE CLERK: Thank you very much.

7 DIRECT EXAMINATION

8 BY MR. MURRAY:

9 Q Ms. Vecchio, thank you very much. I've read your
10 declaration and I just have a few questions about it. And if
11 you -- do you have it in front of you by any chance?

12 A I do not.

13 THE COURT: Well, do you have an extra? You can
14 look at mine.

15 MR. SWINTON: We have a copy for her, Your Honor.
16 If you can just give us one second.

17 THE COURT: All right.

18 (Pause)

19 THE WITNESS: It's in the manilla folder of D-5.

20 BY MR. MURRAY:

21 Q Well, perhaps I can just use the ELMO then, Your Honor.

22 THE COURT: All right.

23 THE WITNESS: That's fine.

24 BY MR. MURRAY:

25 Q All right. Now, Ms. Vecchio, you were given a number of

1 records to review and to analyze statistically, correct?

2 A Correct.

3 Q Okay. And you were given the records that we had
4 provided in discovery, for example, for Vivid Video, correct?

5 A Correct.

6 Q And then you tabulated the -- the records to determine
7 the calculation of the ages of all the performers and then you
8 created the chart, correct?

9 A Well, I actually used the chart to calculate the ages,
10 but, yes.

11 Q Okay. And I just want to make sure of a couple things.
12 What was provided was 25 DVDs produced by Vivid Video; is that
13 correct?

14 A Yes, those were provided, along with identification and
15 release forms that included dates and date of birth.

16 Q Right. And -- and this was provided by us in the course
17 of discovery proceedings, correct --

18 A Yes.

19 Q -- by the plaintiffs? And you understood that in the
20 course of the discovery proceedings, we provided, for example,
21 records in some cases spanning a time frame from January 1,
22 2005 to December 31, 2009? Did you understand that?

23 A Yes.

24 Q Okay. And so in the case of -- but in the case of Vivid,
25 we've provided 25 DVDs and their accompanying records?

1 A Yes.

2 Q Okay. But you recognize -- and it's not your fault, and
3 I'm not being in any way critical. I thought you did a good
4 job. You recognize that that's not the entire universe of
5 records and DVDs that Vivid Video produced, correct?

6 A Correct.

7 Q Okay. Now, in the case of Mr. Morey (phonetic), again,
8 you were provided with copies of IDs and model releases for
9 some 30 of his models, correct?

10 A Yes.

11 Q And that was, again, pursuant to a limited discovery that
12 we provided on behalf of the ASMP?

13 A Yes.

14 Q Okay. And you recognize, however, that, again, that is
15 not the entire universe of -- of the images that he has
16 created and posted on his website, correct?

17 A Yes.

18 Q Okay. Now, in the case of Dodson and Ross, there was
19 provided 20 IDs and model releases. Do you know how many
20 videotapes that covered?

21 A I do not. I used the releases to identify the
22 performances that they were in. I categorized them by age. I
23 didn't pay much attention to the performances that were
24 listed, except to add them to the chart.

25 Q Okay. So -- and you've been present at this trial all

1 along?

2 A Yes.

3 Q Okay. So you know that we've introduced as exhibits a
4 total of six DVDs produced by Betty Dodson? Do you recall
5 that?

6 A That sounds correct.

7 Q Okay.

8 A I'm not sure of the exact number.

9 Q All right. But you do not know whether the -- the 20 IDs
10 and model releases that you analyzed cover the entire universe
11 of performers in all six of those DVDs, correct?

12 A Not for sure, no.

13 Q Okay. And, again, that's not your fault. This was
14 discovery. We provided you certain things that were
15 requested, and I just want to make sure that you understand
16 I'm not being critical of you. Then, when it comes to Mr.
17 Levingston, we provided you with some 270 IDs and model
18 releases, correct?

19 A Yes. Well, sets that were identifiable, yes.

20 Q Yes. And were any of them of men? Did you happen to
21 notice whether any of the model releases covered men?

22 A They could have. The names were redacted. I was only
23 given initials.

24 Q Okay.

25 A And I don't recall by looking at the photos --

1 Q Okay.

2 A -- to be honest.

3 Q Now, let's go to Sinclair Institute. You were provided
4 with complete information about 24 of their DVDs, correct?

5 A Yes.

6 Q Okay. And, again, everything we gave you, you completely
7 and thoroughly and accurately analyzed, correct?

8 A Correct.

9 Q Okay. But you saw that in the trial we're actually able
10 to offer a total of 45 DVDs from Sinclair?

11 A That sounds right. I'm not, again, sure of the exact
12 number.

13 Q All right. And so, again, the universe of performers
14 appearing in the 45 videos is a little bit greater than the
15 ones that you were able to analyze, correct?

16 A To be honest, with Sinclair I wouldn't be sure. There
17 was a lot of similar performers across all of the DVDs. We
18 could have covered the universe of their performers.

19 Q Okay. You have no way of knowing?

20 A No, I have no way of knowing.

21 Q Now -- then I just want to make sure I understand your
22 chart, and I think I do. Taking Betty Dodson, for example.
23 Of the IDs that you analyzed, there were 20 performers, and 25
24 percent of them were either 25 years of age or younger,
25 correct?

1 A Correct.

2 Q So that would have been five?

3 A Correct.

4 Q Okay. Now, then you analyzed a percentage of performers
5 29 and under, correct?

6 A Correct.

7 Q And so that was 45 percent, correct?

8 A Correct.

9 Q But that includes the 25 percent who were under 25?

10 A It does.

11 Q Okay. So the actual number -- the percentage of
12 performers that were between the ages of 26 and 29 would be 20
13 percent?

14 A I believe so. I'd have to -- I believe so, yes.

15 Q I mean, it makes sense because if --

16 A Yes.

17 Q -- if you add 20 percent to 25, you come up --

18 A Right.

19 Q -- with 45?

20 A Right.

21 Q Okay. So -- and I won't do the math on all the other
22 ones, but that's what we would do to compute those numbers all
23 the way down the road?

24 A Yes, that would be consistent down -- down the road.

25 Q Okay. And then so if I also understand your chart, in

1 the case of Dodson, for example, 75 percent of the performers
2 were at least 26 years of age or older?

3 A Yes.

4 Q And many of them were older than 30 and older than 40,
5 correct?

6 A Correct.

7 Q And in the case of Mr. -- of Ms. Levine, some 76 percent
8 of the performers in -- in her DVDs that you examined were at
9 least the age of 26 or older?

10 A Correct.

11 Q And in the case of Mr. Levingston, at least 56 percent
12 were 26 years of age or older?

13 A Just shy of 56 percent, yes.

14 Q I'm sorry, I stand corrected. And in the case of the
15 Nitke, I guess 63 percent were at least 26 years of age?

16 A Just shy of that, yes. Or -- yes. I'm sorry, 63
17 percent.

18 Q And in the case of Sinclair Institute, according to your
19 analysis, some 79 percent --

20 A Roughly.

21 Q -- of their performers are at least 26 years of age and
22 older?

23 A Roughly that, yes.

24 Q And then in the case of Vivid -- even in the case of
25 Vivid, some almost 60 percent of their performers are at least

1 26 years of age or older; is that correct?

2 A Correct.

3 Q Okay. Thank you very much for clearing up the few
4 questions that I had.

5 MR. MURRAY: That's all I have, Your Honor.

6 THE COURT: All right. Okay. Well, do you still
7 object to the --

8 MR. MURRAY: No, no, no.

9 THE COURT: Okay.

10 MR. MURRAY: I just wanted to have --

11 THE COURT: All right.

12 MR. MURRAY: -- the clarification.

13 THE COURT: All right. Well, thank you very much.
14 Do you have any questions?

15 MR. SWINTON: No, Your Honor.

16 THE COURT: Okay. All right. Well, so the
17 exhibit's admissible. All right. Thank you. All right.
18 Anything else logistically or otherwise?

19 MR. MURRAY: Unless you wanted to address the issue
20 of those experts. I do have one -- one case citation I can
21 give you that -- that permits the same rule -- the same 100
22 mile rule to apply to opponent's experts as well.

23 MS. WYER: Your Honor, plaintiffs have never
24 indicated they wanted to call defendant's experts in their
25 case in chief. I don't understand --

1 THE COURT: You can't do that. You want to call the
2 plaintiff's expert?

3 MR. MURRAY: No, Your Honor.

4 THE COURT: You want to use the -- a deposition of
5 the plaintiff's expert in your case?

6 MR. MURRAY: No.

7 THE COURT: Oh, the defendant's expert?

8 MR. MURRAY: We have -- we have submitted excerpts
9 from the depositions of their witnesses -- their experts under
10 the same rule on the ground that we have a right to introduce
11 those excerpts because Rule 32 applies entirely.

12 THE COURT: All right. What's the case you rely on?

13 MR. MURRAY: The case is -- it's Nichols, II vs.
14 American Risk Management, Inc., United States District Court
15 for the Southern District of New York, 2000 West Law, 9728.

16 THE COURT: 97282?

17 MR. MURRAY: Yes.

18 THE COURT: All right. Just a minute.

19 (Pause)

20 THE COURT: All right. Are you familiar -- have you
21 read this case, Ms. Wyer?

22 MS. WYER: The Nichols --

23 THE COURT: Yes.

24 MS. WYER: -- case? No, I have not, Your Honor.

25 THE COURT: All right. Well, I can -- I can give

1 you my iPad, you can read it. But it seems to hold what Mr.
2 Murray said.

3 But who is the expert?

4 MR. MURRAY: There was a -- short passage from Dr.
5 Dines, a short passage from Dr. Vero, and a short passage from
6 Dr. Wallach.

7 THE COURT: All right. They're all going to testify
8 live?

9 MR. MURRAY: Yes. Yes, as part of their case.

10 THE COURT: But why -- why can't you wait and use it
11 as cross-examination if they don't say the same thing on
12 direct?

13 MR. MURRAY: Well, certainly I could, Your Honor,
14 but we think it is substantive evidence that supports our
15 case, and so we wanted to offer it as --

16 THE COURT: All right.

17 MR. MURRAY: -- part of our case in chief.

18 THE COURT: Could you -- I don't want to make this
19 burdensome but how -- how lengthy are these deposition
20 excerpts?

21 MR. MURRAY: They're just a page -- a couple pages
22 each; two or three pages each.

23 THE COURT: You think you could get a copy of and
24 bring it in Friday morning and I could --

25 MR. MURRAY: We have it here.

1 THE COURT: -- look at it in hard copy, or bring it
2 in tomorrow, or fax it, or -- or do you have it there?

3 This is an opinion by Magistrate Judge Andrew Peck,
4 who's a pretty knowledgeable Judge about discovery. And he --
5 he cites some other cases where this -- this has been allowed.
6 But he agrees that it doesn't come up very often because
7 usually the expert comes to trial, and the closing party
8 prefers to do it by cross-examination, but he allowed it in
9 this case.

10 MR. MURRAY: I have the excerpts here, Your Honor,
11 that we were --

12 THE COURT: All right. Well, could you hand them up
13 and I'll --

14 MR. MURRAY: Yes.

15 THE COURT: -- rule on it Friday morning. Okay.
16 All right. I think that's a better way to do it. Okay. Now
17 -- all right. There's nothing else. Now, I have a topic that
18 I want to bring up. And this is the topic of settlement. And
19 I'm purposely doing it in open court because I know that this
20 is a case that is being closely followed by people in this
21 industry. And it's of concern to them, and I recognize that.
22 And it -- it's my belief, having listened to a lot of
23 testimony and having read a lot of briefs in this case and
24 having been educated by the Third Circuit in their opinion,
25 that it is -- it is clear to me that the -- and you may

1 disagree with this.

2 Both of you may disagree, but one thing that came
3 clear in this testimony and, I think, shows the value of
4 having live testimony that we're just deciding summary
5 judgment motions in a case like this, is that the regulations
6 are at the heart of a lot of the problems that the people in
7 this industry have. And several of the witnesses said this.
8 As a matter of fact, all of them that were asked, I think,
9 agreed that none of them wanted to have people under 18
10 participate in any of their explicit sexual positions --
11 depictions. And that they fully agreed with at least the
12 policy behind the congressional statute.

13 I think -- and I am not, by what I'm about to say,
14 in any way indicating how I'm going to rule in this case. I
15 have not decided that. I don't intend to decide it until all
16 the testimony is done and I've given you a chance to argue.
17 But I -- I think that the plaintiffs on one hand have got to
18 consider that they have an uphill battle in getting me or any
19 Appellate Court to declare this statute unconstitutional on a
20 facial basis. And I -- and I say that even though, Mr.
21 Murray, I think you're a fine lawyer and you did your -- and
22 you -- you argued a lot of the issues that I had decided in
23 the Third Circuit.

24 And although they agreed with you on some, they
25 disagreed with you on basically many of your -- most of your

1 substantive arguments about the facial invalidity of a
2 statute. But they did remand on all issues -- and you were
3 right about that. They remanded on all issues, included your
4 claim, the facial invalidity of the -- of the Fourth -- under
5 the Fourth Amendment, but that's -- that's another issue. But
6 everything was remanded.

7 But, you know, I -- I think in view of the Sixth
8 Circuit, the D.C. Circuit and the fact that the Supreme Court
9 has denied certiorari, that the -- I think your prospects on
10 this statute are -- are a real uphill battle. And I'm not
11 sure that that is really the essence of your -- of your case,
12 at least from the testimony of your witnesses. I think they
13 are most concerned about the onerous nature of the
14 regulations.

15 So I -- what I would like to ask you all to think
16 about is that this case could be settled by the plaintiffs
17 withdrawing their claim of facial invalidity -- facial
18 unconstitutionality, and that the Government would consider to
19 rewrite the regulations, and to simplify them and to give
20 consideration to reducing some of the regulations that the
21 witnesses have testified are the most onerous; particularly
22 about the record-keeping, about the warrantless searches.

23 As I look at the statute, the statute does not
24 require warrantless searches. It gives the -- it says the
25 Attorney General may by regulation prescribe and shall make

1 such records available for inspection at all reasonable times.
2 That leaves some room as to whether warrantless searches were
3 required by the -- by the statute. I don't think they were.
4 But they are part of the regulations, and I upheld that. But
5 that's one of the issues that has been remanded.

6 And as some of the witnesses have said, it's a sore
7 point with them. And in view of the fact that the Government
8 hasn't done any searches in the last six years approximately,
9 I wonder whether they're -- they're giving up anything by
10 agreeing to have regulations that would provide for advance
11 notice of any kind of inspection of records.

12 Same thing with the complaints about the intrusion
13 on privacy. And this is a difficult area, I agree. But the
14 question is whether the Government would be willing to
15 consider regulations that would exempt certain types of
16 completely private and noncommercial use of these videos, just
17 as Congress created exception for certain kinds of commercial
18 use for -- and I know, Mr. Murray, this was another point you
19 raised in the Third Circuit, that they disagreed with you
20 with, but I just wonder whether that is a -- an area that
21 there could be some compromise on.

22 Now, I'm aware, as I just said in the last case, of
23 the Supreme Court subpoenaing in Arlington. I think that once
24 again, you know, the -- the plaintiffs have a burden here of
25 showing that the regulations are overly burdensome, that they

1 make the statute as applied unconstitutional, but they have
2 had some testimony that is -- at least I think is credible in
3 terms of the people stating what their belief is and what
4 their practices have been. Whether it's legally sufficient, I
5 don't know. But I think that this is something that should be
6 considered.

7 Now, as far as the procedure goes, what I would like
8 to recommend to you, Mr. Murray, and you don't have to do
9 this, but I would like you -- I don't think it will take you
10 and your colleague or your clients very much time -- and,
11 obviously, you'd want to discuss this with them -- is I would
12 like you -- I would like to see -- if you want to do this.
13 Maybe neither of you are interested. And if that's the case,
14 that's fine, we'll go ahead and I'll decide everything and let
15 the chips fall where they may.

16 But what I would like to recommend is that promptly
17 -- and since we have a day off tomorrow, I'm hoping you might
18 spend -- be willing to spend some time on this tomorrow with
19 your clients and either -- whether by telephone or whatever --
20 is come up with a -- a reasonable, realistic list of the parts
21 of the regulations that you find the most objectionable, the
22 most burdensome, and the least necessary to prevent child
23 pornography -- to prevent people under 18 from participating
24 in this.

25 All of your clients said they have no problem with

1 the -- getting the photo IDs and -- and maintaining them. So,
2 to me, clearly, that should be part of the regulation. So
3 there ought to be a -- and then I -- so there has to be some
4 -- some documentation. But propose something that would
5 lessen the burdensomeness. And now that we -- one of your
6 witness -- I think Ms. Wilson said she didn't know you could
7 have electronic records. The -- the regulations clearly allow
8 for electronic records. I don't know -- personally know how
9 long that's been in there, but it's certainly there now.

10 So there's no need for any of these people to keep
11 -- except for that one piece of -- maybe the model release and
12 the actual photo ID, everything else can be digital, can be
13 electronically stored. And we all know how that has changed
14 discovery in litigation in general. And there's no reason why
15 you can't lessen the burden on your clients who are in this
16 industry.

17 And I add -- because it's also obvious from the
18 testimony -- but you don't need testimony to figure this out
19 -- that adult pornography has become a huge industry. And as
20 I asked one of the witnesses, you know, what was prohibited in
21 the United States as little as 50 years ago is now on the
22 internet all over and depicted and -- it used to be just
23 written that was salacious or was considered explicit could be
24 banned.

25 Now, that -- that kind of legal principle has been

1 completely abandoned by -- I don't know any Judge that would
2 ban a written book because of the language that was used. And
3 we have visual depictions that are all over the place.
4 They're on the internet. Some you have to pay for, and a lot
5 of them are free. And it shows -- and there's a great demand
6 for this.

7 So there are many people in the United States who
8 think this is terrible, but there are equally many who think
9 it's good and they -- because they use it, and they
10 participate in it, or they observe it and they pay for it.
11 And that's the reality for -- for better or worse. So -- and
12 that has to be a factor here. So I would like you to come
13 -- suggest that you come up with this list and that you
14 transmit to counsel for the Government. And on the
15 Government's side, I would like you to have an open mind about
16 this and talk to your superiors.

17 And I know that the Justice Department is a
18 bureaucracy. I was part of it for awhile, and I know that
19 none of you here in this courtroom would have any authority to
20 agree to this. But I would like you to talk to your superiors
21 and tell them that you -- the Judge would like you to -- would
22 like them to seriously consider this as a way of settling this
23 case. Otherwise, you're -- you know, I don't know how this is
24 going to end up.

25 I'm going to do my best, but, obviously, there's

1 going to be another appeal. Maybe the Supreme Court will take
2 the case, maybe they won't. But the -- if -- if they review
3 the regulations and a simplification of them and a reduction
4 of the burdensomeness of some of them that have been presented
5 by this testimony would foreclose future litigation in this
6 area, the present case and future litigation.

7 I think that would be a public service because you
8 -- the Justice Department has many areas, including child
9 pornography, obviously, that are very important and deserve
10 your full attention and your -- the full weight of your law
11 enforcement authority. Whereas, this is, I think, in some
12 areas something that has become such a part of everyday life
13 for many people that consideration ought to be given to coming
14 to a legal resolution of this at least.

15 And -- now, let me say this. I am not in the
16 business of writing regulations. I'm not -- I have no
17 experience in it, and I don't have expertise. But I would
18 have to say about these regulations here, part 75, that I
19 think a lot of them are difficult to read and for a layperson
20 to understand. They're very, very comprehensive, and they're
21 not what I would call plain language that, I think, could be
22 used to achieve the same goals.

23 So I would urge you to give some -- if the
24 plaintiffs are willing to give you this list of regulations
25 that they find the most offensive, I would ask you to, in good

1 faith, discuss it, and if your superiors would allow you to,
2 to engage in a dialogue with plaintiff's counsel.

3 Now, I do not want to be part of that dialogue.
4 Because this is a nonjury case, I don't think I can in any way
5 help you negotiate a settlement. If you were seriously --
6 both seriously interested in a settlement along the lines that
7 I'm suggesting, or any other way, I would make available one
8 of our Magistrate Judges, because in this district that's what
9 we use Magistrate Judges for primarily is to settle cases.
10 But I'm not -- I'm only going to do that if you're both
11 committed and both interested and both intent on working
12 towards a regulation -- a resolution.

13 Another alternative would for me to be appoint or
14 suggest an independent mediator. But that -- that would
15 require payment because I'm not going to ask anybody to do
16 this for free. There are a lot of people who I know who I
17 think could be very good at it, if for any reason you'd want
18 to use a Magistrate Judge.

19 Now, there's one other wrinkle that I don't know the
20 answer to. Because this is a published regulation, I don't
21 think that the plaintiffs could dictate an outcome because it
22 would have to go through the regulatory framework. And it
23 would be subject to comments. And there could be a third
24 party out there that could be -- for example -- I don't know
25 this would happen, but we have a group of Congressmen --

1 Congressmen and women who are amicus parties here.

2 And if the Justice Department were to embark down
3 this road of settlement that I'm suggesting, it's possible
4 that that group or a similar group -- they could be private
5 citizen -- would want to get into the regulatory appeal
6 process and object to it or put in their own two cents. And
7 it could be that it could end up something different than the
8 plaintiffs want it to.

9 Even though there would be a revision, it may not be
10 exactly what you had in mind, but you might be stuck with it.
11 I don't know how that would work out. And I'm not sure I
12 could retain jurisdiction over this issue because appeals from
13 these regulations generally go to the -- just the Circuit
14 Court of the District of Columbia, as I understand the
15 process. But I -- I could be wrong about that.

16 Okay. I'm not asking for any comment now. I'm
17 saying this for what I see as a possible road to resolution
18 that would eliminate some expense on both sides, would provide
19 certainty, to a large extent, subject to what I said about the
20 wrinkly of the final administrative agency rule-making
21 process. But I think it is something you should consider.

22 Okay. Thank you very much.

23 MR. MURRAY: Your Honor, may we approach the bench
24 one -- for one moment?

25 THE COURT: You mean at sidebar?

1 MR. MURRAY: Yes.

2 THE COURT: Yes, but -- and bear in mind that
3 there's a risk I may repeat it for the record, because I don't
4 -- I want to do everything in this case in open court.

5 MR. MURRAY: Yes.

6 THE COURT: But sure, you can come up. Do you want
7 your colleagues here or no? (No audible response) You could
8 all come up, too.

9 (Off the record discussion at sidebar)

10 THE COURT: This is off the record.

11 (Off the record discussion at sidebar)

12 THE COURT: Okay. All right. Well, the discussion
13 at sidebar did not concern precisely what I'm talking about.
14 What I am talking about, just to be clear, is that the
15 plaintiffs, if they're interested, would start this dialogue
16 by having specific topics, such as record-keeping, private in-
17 home videos. Those are the two that stick out in my mind.
18 The third would be warrantless searches or advance notice of
19 search -- reasonable advanced notice of search. Those are the
20 three items. And you can just say these are the topics we'd
21 like to see change. Or you could submit a little squib of
22 some proposed mechanism. I'd leave that up to you.

23 I am not talking about an amendment to the statute.
24 That would require Congressional action. Under the separation
25 of powers, I have no power to even suggest that as a means of

1 settling cases. That's completely up to Congress. I'm
2 talking about the Justice Department changing the regulations.
3 Okay?

4 So if that's the line you want to go down, I would
5 strongly recommend that the -- that the Department consider
6 your suggestions and tell your superiors that the Judge thinks
7 this is a viable and reasonable way to settle this litigation
8 and most likely end this type of litigation, at least for the
9 foreseeable future.

10 All right. Thank you very much. I'll see you
11 Friday morning at 9:15.

12 ALL COUNSEL: Thank you, Your Honor.
13 (Proceedings concluded at 4:04 p.m.)

14

15 C E R T I F I C A T I O N

16

17 I, Brenda Boulden, court approved transcriber,
18 certify that the foregoing is a correct transcript from the
19 official electronic sound recording of the proceedings in the
20 above-entitled matter.

21

22

23 _____ June 13, 2013

24 BRENDA BOULDEN

25 DIANA DOMAN TRANSCRIBING